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SUPREME

COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 15555.

TERM No. 1171.

FRANKLIN SAVINGS BANK, ET AL.,

vs.

ROBERT C. TAYLOR, ET AL.,

PETITION OF ROBERT C. TAYLOR, KATHERINE TAYLOR AND MARGARET TAYLOR FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

EDWIN L. HARPHAM,
Attorney for Petitioners.

In the Supreme Court of the United States.

Franklin Savings Bank, Hiram H. Thomas, Henry Gilsdorff, James B. Sullivan, Fredrick Baumann and Edward Baumann, *Appellants*,

vs.

Robert C. Taylor, Katherine Taylor, Margaret Taylor, Frank C. Taylor, Jr., Maria L. Taylor, Jr., Josephine Taylor and Alexander Taylor, *Appellees.*

The petition of Robert C. Taylor, Katherine Taylor and Margaret Taylor for a writ of certiorari directed to the United States Circuit Court of Appeals for the Seventh Circuit, to bring before the Supreme Court the case of the Franklin Savings Bank, et al., against Robert C. Taylor, et al. The said case being case numbered (5) five in said United States Circuit Court of Appeals for the Seventh Circuit.

To the Honorable, the Supreme Court of the United States:

Your petitioners, Robert C. Taylor, Katherine Taylor and Margaret Taylor, minors and citizens of the state of Illinois, in the Northern District of the state of Illinois, by Charles D. Sherman, a citizen of said state of Illinois, their next friend, of said district, humbly pray your Honorable Court to issue your writ of certiorari to the United States Circuit Court of Appeals for the Seventh Judicial Circuit, commanding said United States Circuit Court of Appeals to certify to your Honorable Court the record of its proceedings in a certain cause heretofore pending and determined in said court, wherein the Franklin Savings Bank, Hiram H. Thomas, James B. Sullivan, Henry Gilsdorff, Fredrick Baumann and Edward Baumann were appellants, and these petitioners and Charles H. Mulliken, Frank C. Taylor, Sr., Maria L. Taylor, Sr., Frank C. Taylor, Jr., Josephine S. Taylor, Alexander Taylor and Ira Scott were appellees, which was heard upon appeal by the said United States Circuit Court of Appeals from the Circuit Court of the United States for the Northern District of Illinois, Northern Division. A certified copy of the record of said cause in said Circuit Court of Appeals is herewith filed and made a part of this application.

It will appear from the said record that your petitioners, then and now citizens of the state of Illinois, together with Frank C. Taylor, Jr., Maria L. Taylor, Jr., Josephine S. Taylor and Alex-

ander Taylor, also then and now citizens of the said state of Illinois, by their next friend, John Q. Wells, then a citizen of said state of Illinois, did on the first day of December, in the year of our Lord one thousand eight hundred and eighty-four, file their bill of complaint on the chancery side of the superior court of Cook county, in said state of Illinois, against the said Henry Gilsdorff, James B. Sullivan, Fredrick Baumann, Edward Baumann, Frank C. Taylor, Sr., Maria L. Taylor, Sr., and Charles H. Mulliken, then and now citizens of the state of Illinois, and the Franklin Savings Bank, a corporation created under and by virtue of the laws of the state of Rhode Island, and a citizen of said state of Rhode Island, to which said bill of complaint said Henry Gilsdorff, James B. Sullivan, Fredrick Baumann and Edward Baumann appeared and answered, and said Franklin Savings Bank and Hiram H. Thomas appeared and filed therein their petition for the removal of said cause to the Circuit Court of the United States, for the northern district of Illinois, which said cause was on the 27th day of February, in the year of our Lord one thousand eight hundred and eighty-five, removed to said Circuit Court of the United States, and on the 18th day of March, in the year of our Lord one thousand eight hundred and eighty-seven, an order was entered therein by said court confessing a demurrer to said bill, dismissing the same as to the complainants, Frank C. Taylor, Jr., Maria L. Taylor, Jr., Josephine S. Taylor and Alexander Taylor, without prejudice and making them defendants, and giving said Robert C. Taylor, Katherine Taylor and Margaret Taylor leave to file an amended bill therein and make said Frank C. Taylor, Jr., Maria L. Taylor, Jr., Josephine S. Taylor and Alexander Taylor, defendants; that these petitioners did on the said 18th day of March, in the year of our Lord one thousand eight hundred and eighty-seven, file their amended bill of complaint against said Franklin Savings Bank, a corporation as aforesaid, said Hiram H. Thomas, Henry Gilsdorff, James B. Sullivan, Fredrick Baumann, Edward Baumann, Charles H. Mulliken, Frank C. Taylor, Sr., Maria L. Taylor, Sr., Frank C. Taylor, Jr., Maria L. Taylor, Jr., Josephine S. Taylor, Alexander Taylor and Ira Scott, in which these petitioners prayed that two certain decrees of the Superior Court, of the county of Cook, entered in that court on the 4th day of March, in the year one thousand eight hundred and seventy nine, upon certain bills of review filed in that court, be declared absolute as to claims of the Franklin Savings Bank, and E. W. Russell, as successor in trust to Francis S. Howe, deceased, to certain real estate situated in said

county of Cook, belonging to these petitioners, and said Frank C. Taylor, Jr., Maria L. Taylor, Jr., Josephine S. Taylor and Alexander Taylor, more particularly described in said amended bill so filed as aforesaid; that a certain decree of the Circuit Court of said county of Cook, establishing and declaring a lien upon said real estate in favor of said Gilsdorff, Baumann and Sullivan be declared to be fraudulent and void as to these petitioners, and to have created no lien upon said property or the estate of these petitioners therein, and that the deed or deeds of said land executed and delivered by the Master in Chancery of said Superior Court to said Thomas, pursuant to sale under said decrees in favor of said Gilsdorff, et al., be declared to be void and of no effect whatever; that a certain decree of foreclosure of the Circuit Court of the United States for the northern district of Illinois, entered on the 30th day of April, in the year of our Lord one thousand eight hundred and eighty, be reviewed, reversed and set aside, and that certain trust deeds to Francis S. Howe, trustee, and E. W. Russell, successor in trust, be declared to be void and of no effect upon the estate and interest of these petitioners in the land and premises therein described; that some fit and proper person be appointed by the order and decree of the said court as trustee of the trust estate belonging to these petitioners, more fully described in said amended bill, and that said Scott, Peabody and Mulliken be commanded to make, execute and deliver to such trustee all needful and proper conveyances to vest in him the title to said trust estate; that such new trustee when appointed be let into possession of all and singular of the said lands and premises; that the said Franklin Savings Bank be required to account for all money received as rents and profits from said real estate belonging to these petitioners during its possession of the same, and to pay over to such new trustee any balance remaining in its hands after payment of the necessary expenses of maintaining said property; and that in the meantime a receiver be appointed by the said honorable court to take possession of the said real estate, to collect, get in and receive the rents, issues and profits thereof, and to hold the same subject to the order of said court.

Your petitioners further show that the said Franklin Savings Bank, Hiram H. Thomas, Henry Gilsdorff, James B. Sullivan, Fredrick Baumann, Edward Baumann, Frank C. Taylor, Sr., Maria L. Taylor, Sr., Frank C. Taylor, Jr., Maria L. Taylor, Jr., Josephine S. Taylor, Alexander Taylor and Ira Scott all entered their appearance and filed their answers to the said amended bill of

these petitioners, and issue was joined thereon, and that a default was entered against said Charles H. Mulliken and the bill taken as confessed; and afterward, on the 27th day of June, in the year of our Lord one thousand eight hundred and eighty-seven, an order was entered in said cause giving said Frank C. Taylor, Jr., Maria L. Taylor, Jr., Josephine S. Taylor and Alexander Taylor leave to file their cross-bill in said cause, which was done on the said 27th day of June, in the year of our Lord one thousand eight hundred and eighty-seven, and in which said cross-bill the said Franklin Savings Bank, Hiram H. Thomas, Ira Scott, Henry Gilsdorff, James B. Sullivan, Fredrick Baumann, Edward Baumann, Charles H. Mulliken, Frank C. Taylor, Sr., Maria L. Taylor, Sr., and these petitioners were made defendants; and said complainants, by their said cross-bill, prayed for the same relief as that asked for by these petitioners in their said amended bill.

Your petitioners further show that all of the defendants in the said cross-bill filed their answers thereto, and issue was joined thereon, except said Mulliken, against whom it was taken as confessed that on the 27th day of June in the year of our Lord one thousand eight hundred and ninety, an order was entered in said cause substituting and appointing Charles D. Sherman as next friend of said complainants and cross-complainants in said amended bill and cross-bill, and said cause was tried before Hon. Henry W. Blodgett, who filed his opinion therein on the 13th day of July in the year of our Lord one thousand eight hundred and ninety-one, and on the 10th day of August in the year one thousand eight hundred and ninety-one, entered a decree in said cause granting the prayer of these petitioners in their said amended bill.

These petitioners further show that on the said 10th day of August in the year of our Lord one thousand eight hundred and ninety-one, the said Franklin Savings Bank, Hiram H. Thomas, Henry Gilsdorff, James B. Sullivan, Fredrick Baumann and Edward Baumann prayed an appeal in said cause to the United States Circuit Court of Appeals for the seventh district, which was perfected on the said 10th day of August, by the filing of their bond therein.

Your petitioners further show that upon the hearing of said appeal before said Circuit Court of Appeals in said cause, said Circuit Court of Appeals reversed the decree of said United States Circuit Court, and remanded said cause with instructions to dismiss said bill and cross-bill.

These petitioners further show that on the 20th day of February, in the year of our Lord one thousand eight hundred and ninety-

three, leave was given appellees to file a petition for a re-hearing in said cause, which was done, and said petition was, on the 2d day of May, in the year of our Lord one thousand eight hundred and ninety-three, overruled.

These petitioners further show that on the 3d day of May in the year of our Lord one thousand eight hundred and ninety-three, an order was entered in said cause by said United States Circuit Court directing the filing of the mandate of said Circuit Court of Appeals, and the redocketing of said cause, and on the 6th day of May in the year of our Lord one thousand eight hundred and ninety-three, by the order of said Circuit Court said amended bill of these petitioners and said cross-bill was dismissed with costs, as will more fully appear by certified copies of said orders so made as aforesaid by said United States Circuit Court filed herewith and made a part hereof.

These petitioners would respectfully represent that the said Circuit Court of Appeals by a decree and opinion filed in this cause, seems not to have recognized the rule that has obtained from the earliest dawn of equity jurisprudence until the present time, that the property interests of infants are under the special care and protection of courts of equity, and to have held and established a precedent that infants cannot attack decrees and other proceedings, and have them set aside because of a fraud upon their rights as against parties who acted under them while they were in force; that such a rule has been established by the decree and opinion of said Circuit Court of Appeals, as these petitioners are advised, contrary to the long established rule observed by the courts of the state of Illinois in reference to the rights of infants in trust estates; that a distinction in reference to the notice which the recording of a deed in said state gives to the public at large is made by said opinion and decree of said Circuit Court of Appeals, hitherto not observed or recognized by the said courts of said state of Illinois, and that said opinion and decree of said Circuit Court of Appeals establish a precedent in said state for defeating the rights of many more minor children, all of which tend to make the questions involved in this cause of so much importance and of such gravity that it would seem just and proper for this court to review the proceedings of this cause in said Circuit Court of Appeals.

Wherefore, your petitioners pray that your writ of certiorari may issue as heretofore prayed, and that the record of said cause may be duly certified to this court for your review and determination, and that you exercise the same power and authority in the premises as

though this cause had been brought here for review by a writ of error or appeal.

ROBERT C. TAYLOR,
KATHERINE TAYLOR,
MARGARET TAYLOR,
By Charles D. Sherman,
Their next friend.

EDWIN L. HARPHAM,
Attorney for Petitioners.

I hereby certify that I have examined the foregoing petition, and that, in my opinion, the same is well founded and presents a proper case for review and determination by this court, and that the prayer of the petitioners therein should be granted.

EDWIN L. HARPHAM,
Attorney.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 15,555,

Term No. 1,171.

FRANKLIN SAVINGS BANK, ET AL.

APPELLANTS,

vs.

ROBERT C. TAYLOR, ET AL.,

APPELLEES.

Brief and Argument of Petitioners for Writ of Certiorari.

EDWIN L. HARPHAM,
Solicitor for Petitioners.

JAMES L. CLARK,
Solicitor for Appellees, Frank C. Taylor, Jr., Maria L. Taylor, Jr.; Josephine S. Taylor and Alexander Taylor.

Supreme Court of the United States.

Franklin Savings Bank, Hiram H. Thomas, Henry Gilsdorff, James B. Sullivan, Fredrick Baumann and Edward Baumann, *Appellants*,

vs.

Robert C. Taylor, Katherine Taylor, Margaret Taylor, Frank C. Taylor, Jr., Maria L. Taylor, Jr., Josephine S. Taylor and Alexander Taylor, *Appellees*.

BRIEF FOR PETITIONERS.

STATEMENT.

This is an application by Robert C. Taylor, Katherine Taylor and Margaret Taylor, by their next friend, for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Judicial Circuit, commanding said United States Circuit Court of Appeals to certify to this court the record of the proceedings in a certain cause heretofore determined in said court

in which the Franklin Savings Bank, Hiram H. Thomas, James B. Sullivan, Henry Gilsdorff, Fredrick Baumann and Edward Baumann were appellants, and these petitioners and Frank C. Taylor, Sr., Maria L. Taylor, Sr., Frank C. Taylor, Jr., Maria L. Taylor, Jr., Josephine S. Taylor, Alexander Taylor and Ira Scott were appellees, which was heard upon appeal by the said United States Circuit Court of Appeals from the Circuit Court of the United States for the Northern District of Illinois, Northern Division. The principal facts involved in the case and the issues therein have been so well and clearly stated in the opinion of Judge Blodgett in the Circuit Court, that we adopt the same here. The opinion is found on page 63 of the Transcript of Record, and the statement of the facts is as follows:

"This is a bill to review, reverse and set aside a de-
"cree of foreclosure, entered in this court on the 30th
"of April, 1880, under which defendant claims title to
"lots 1, 4 and 5 of the subdivision of lot 4 in block 16,
"in Bushnell's addition to the city of Chicago. And
"also to set aside a sale made July 15, 1881, under a
"decree for a mechanics' lien in favor of Gilsdorff and
"others, entered in the Circuit Court of Cook county,
"July 20, 1874. The original bill of review was filed
"by Robert C., Katherine and Margaret Taylor, chil-
"dren of Frank C. and Louise Taylor. And the
"cross-bill was filed by Frank C. Taylor, Jr., and
"Maria Louise Taylor, Jr., Josephine S. Taylor

"and Alexander Taylor, infants, and older children "of Frank C. and Louise Taylor, Sr. The facts, "as they appear from the proof and which are not "disputed, are, that on the 13th of June 1871, "Maria Louise Taylor, being seized in fee of all "of lot 4, in block 16, Bushnell's addition to Chicago, "joined, with her husband, Frank C. Taylor, in the ex- "ecution of a deed of said premises to Ira Scott, to "hold upon certain trusts, in the deed set forth, "which trusts, so far as it is necessary to state them "for the purposes of this case, were, that the property "was to be held for the benefit of Mrs. Taylor and the "children of the marriage between Frank C. Tay- "lor, her husband, and herself, except that in the "event of the death of Mrs. Taylor, and of the chil- "dren, before the youngest child had reached the age "of twenty-one years, Mr. Taylor, or his heirs, should "become entitled to the remainder of the estate. The "deed of trust contained an express provision, 'that "'no lien, incumbrance or charge shall be created on "'said premises,' and although there was a provision in "the trust deed that the trustee might sell some por- "tion of the premises for the purpose of improving "that which was unsold, yet the provision was so "guarded as to prohibit the creation of any lien, in- "cumbrance or charge upon the unsold portion of said "premises."

"At the time the deed was made there was a house "upon the premises, which was occupied by Mr. and

"Mrs. Taylor as their home, this house covering only "a comparatively small part of the lot."

"When this trust was created three children had been "born to Mr. and Mrs. Taylor, and four have since been "born, and this bill was filed by the three youngest of "the seven children, the three oldest having arrived "at lawful age since this bill was filed, and the other "four are still minors."

"By the great fire of October 8 and 9, 1871, the "house upon the trust premises was destroyed, and the "public records of deeds of land titles in the city were "also destroyed, and the trust deed itself was for "several years supposed to have been destroyed by the "same fire, although it had been duly recorded within "a few days after its date. In January, 1872, Mr. "Taylor borrowed the sum of $30,000 from the Frank-"lin Savings Bank, the principal defendant in this "case, for which he gave his own note, payable one "year after date, and, to secure the payment of that "note, he and his wife executed to Edward Brown a "trust deed upon the whole of said lot 4, in block 16. "The money so borrowed by Taylor was used in build-"ing upon the trust premises a block of five dwelling "houses, which cost about $53,700. In January, 1873, "Taylor and his wife filed a petition in the Superior "Court, of Cook county, under the provisions of what "is known as the "Burnt Records Act" of this state, "alleging the making and recording of the deed of "trust, the destruction of the records, and the loss of

"the deed itself, and praying an establishment and con-
"firmation of the trust deed and its terms, as set out in
"said petition. And such proceedings were had under
"this petition, that on the 20th of March, 1873, a
"decree was entered establishing and confirming what
"was found, from the proof, to be a substantial copy
"of the trust deed, but, in fact, omitting the clause
"which provided that no lien, incumbrance or charge
"should be created on the premises, and containing, in
"place of that clause, a clause that authorized the
"trustee to make liens for the purpose of rebuilding,
"etc."

"After the entry of this decree, Scott, the trustee,
"and Taylor and wife made a subdivision and plat of said
"lot 4, dividing the same into five sub-lots, numbered
"from 1 to 5, inclusive."

"On the 22d of July, 1873, Mr. Scott declined to
"act longer as trustee, and Taylor and wife filed a bill
"in the Superior Court of Cook county for the ap-
"pointment of another trustee, and that such new
"trustee be empowered to make a loan of money suffi-
"cient for the fair value and cost of the improvements
"made on said lots, and a decree was on the 19th of
"August, 1873, entered appointing Charles H. Mul-
"liken, trustee, as successor to Mr. Scott, and author-
"izing him to make a loan to pay Mr. and Mrs. Taylor
"the cost of the improvements made on the lots, not to
"exceed $53,700. Mr. Mulliken accepted the trust
"and on the 23d of August made four trust deeds

"covering sub-lots 1, 2, 4 and 5 of said subdivision, to "Francis S. Howe, trustee, to secure the payment of "four notes of $9,000 each, given by Mulliken and Mr. "and Mrs. Taylor to the Franklin Savings Bank, and "on the 1st of January, 1874, Mulliken, the trustee, "and Mr. and Mrs. Taylor joined in the execution of "another trust deed to Francis S. Howe, to secure the "individual note of Taylor to the Franklin Savings "Bank for $2,875."

"The proceeds of the four first mentioned trust deeds "were used to take up the $30,000 loan made by "Taylor from the bank in June, 1872, and the last "mentioned trust deed for $2,875 was to secure a per-"sonal indebtedness of Taylor's to the bank, not grow-"ing, as the proof shows, out of the rebuilding."

"In September, 1873, a petition for a mechanics' "lien was filed by Henry Gilsdorff for labor and ma-"terials used in the construction of the block of new "buildings, in which petition other contractors inter-"vened. This case came to hearing in July 1874, and "resulted in a decree establishing liens on the premises "in favor of Gilsdorff and those who had intervened "with him, which decree was afterward affirmed by "the Supreme Court of this state at the September "term, 1874."

"In June, 1876, the Franklin Savings Bank filed in "this court a bill to foreclose the four trust deeds of "August 23, 1873, which, after default of some of the "adult defendants, and answers by the guardian *ad*

"*litem* of the infant defendants, was, in May, 1877, "referred to a master to take proofs and report. In "June, 1877, the original deed of trust to Scott was "found and very soon thereafter bills of review were "filed in the case under the "Burnt Records Act," and "in the suit brought for the appointment of a new "trustee in place of Scott, in which the decree appointed "Mulliken trustee, and authorized him to make the "loan to pay for building the five houses, which bills "of review resulted in decrees setting aside the former "decrees in those cases, but the decree in the case, "under which Mulliken was appointed trustee, con- "tained a clause that nothing therein ordered or con- "tained should deprive the Franklin Savings Bank, or "Howe, the trustee in said trust deeds, of any in- "terest they or either of them might have in the trust "estate, the claims of the bank and said Howe not "having been heard or adjudicated."

"After the original trust deed was found, the bank "filed a supplemental bill in the foreclosure case, which "was answered before a report was made by the "master. Terms of settlement or compromise were "made between the bank and the guardian *ad litem* of "the infant defendants then in court, which included "all the children then born, and all the children of the "parents, except Margaret, the youngest. By this "compromise, the children were to have one of the sub- "lots and the house thereon, free and clear of all in- "cumbrance. On the 29th of April, 1880, a decree of

"foreclosure was entered in the foreclosure suits in pur
"suance of the terms of this agreement, which by its
"terms was a foreclosure of the four trust deeds on sub-
"lots 1, 2, 4 and 5 respectively, and of the trust
"deed securing the $2,875 (Taylor's individual debt),
"on the whole four lots, and a sale was directed to be
"made by one of the masters of the court of the sub-
"lots 1, 2, 4 and 5 to pay the amount found due by said
"decree on the said respective trust deeds; the lien of
"the several trust deeds on the premises, covered by
"them respectively, being found by the decree to be
"subject to the prior mechanics' lien established by the
"decree in the Gilsdorff case."

"A sale was made under this decree on the 16th of
"June, 1880, and each house and lot sold to the bank
"and certificates of purchase given by the master to
"the bank as such purchaser, and afterward, to con-
"summate the settlement made with the guardian *ad*
"*litem* of the infant children, the certificate of pur-
"chase for lot 2 at such master's sale was assigned to
"the guardian *ad litem*, and by him assigned to the six
"children then born, and a deed was in due time made
"to them by the master, and a deed was also made to
"the bank of lots 1, 4 and 5."

"After the affirmance by the Supreme Court of the de-
"cree in the mechanics' lien case, the bank purchased
"the decree in that case, and was the owner of such de-
"cree at the time of the entry of the decree in the fore-
"closure case and at the time of the alleged compromise

"and settlement, and on the 15th of July, 1881, a "sale was made under the mechanics' lien decrees, and "the defendant, H. H. Thomas, who was then the presi- "dent of the bank, became the purchaser of the three sub- "lots 1, 4 and 5, and it is admitted that this purchase "was made by Mr. Thomas for the bank, and that he "now holds the title solely for the bank and has no in- "dividual interest therein."

"It also appears that the three oldest children were "made defendants to the bill for the restoration of the "deed of trust under the "Burnt Records Act," and "appeared and answered by guardian *ad litem;* that the "four oldest children were made parties to and ap- "peared and answered by guardian *ad litem*, in the bill "for the appointment of a new trustee, and that under "the mechanics' lien trust the four oldest children were "made parties defendant, and appeared and answered "by guardian *ad litem.* But the Supreme Court in the "suits brought by Julia S. Taylor against the bank, to "set aside the decree in the mechanics' lien suit, as far "as it affected lot 3 in said subdivision, found that "there was no service upon the infant defendants in "the mechanics' lien case. It also appears that the "youngest child, Margaret, who is one of the original "complainants in this case, was born after the entry of "the decree in the foreclosure case. It also appears "that all the seven children born of the marriage of "Mr. and Mrs. Taylor, who are parties to the original "and cross-bills in this case, were minors at the time "the original and cross-bills were filed."

"The contention on the part of the complainants is "that all the four trust deeds, given by Mulliken, "trustee, with the consent of Mr. and Mrs. Taylor, on "the four houses and lots, and also the decree in the "mechanics' lien case, are all void and inoperative as "against the complainants and cross-complainants, un- "der the clause in the deed of trust to Scott, which "prohibited the creation of any lien, incumbrance or "charge on the trust premises, that they are not bound "by the decree in the foreclosure case because the de- "cree was by consent, and they were not competent to "give such consent, and that the decree in the mechanics' "lien case did not bind the infant defendants therein "because there was no service of process on them, and "also because such decree was obtained by imposing "upon the courts the false deed established by the de- "cree in the 'Burnt Records Act,' of all which and of "the true terms of the genuine trust deed it is claimed "the petitioners in the mechanics' lien case, and the "bank and its president, Mr. Thomas, were bound to "take notice, while, on the part of the defendant, the "Franklin Savings Bank and Mr. Thomas, it is con- "tended that the three oldest of the minor children "were made parties to the mechanics' lien case and ap- "peared and answered by guardian *ad litem*, and are "bound by said decree, and that the proof does not "show that they were not served with process in the "case, and that the children, so brought into the me- "chanics' lien case were of the same class as to their

"rights and interest in the property as the after-born "children, and that the after-born children were prop- "erly and sufficiently represented in the mechanics' lien "suit, by their older brothers and sisters, and that they "are, therefore, bound by such representation of their "class, that the three oldest children were parties to "the proceeding under the 'Burnt Records Act,' which "established by the decree of the court the power on "the part of the trustee to loan money and give the "securities in question. That all the children of Frank "C. and Maria L. Taylor were made parties in the fore- "closure suit, except Margaret, who was born after the "entry of the decree in said case, and that they ap- "peared in said case, by their guardian *ad litem*, and "answered, and the decree in said case is binding on "them, and each of them, and on the after-born child, "Margaret, as she was represented in her class."

Judge Blodgett in the above statement says, that by decree of the Superior Court of Cook county, of the 19th of August, 1873, Charles H. Mulliken was appointed trustee, as successor to Mr. Scott, and he was authorized to make a loan to pay Mr. and Mrs. Taylor. This is a little broader perhaps than the decree itself expresses, as will be seen by consulting that part of the decree on page 115 of the Transcript of Record, and is in the following language, to wit:

"And it is hereby further ordered, adjudged and "decreed that the said Charles H. Mulliken, as such "trustee, be and he is hereby authorized and em-

"powered out of any funds arising from the sale of said "premises, or any part thereof, or from any loan made "for that purpose, to pay and discharge to said Frank "C. Taylor and Maria L. Taylor all the costs of said "improvements as aforesaid advanced and paid by them, "or either of them, not to exceed in amount the "sum of $53,700."

The testimony of E. O. Brown, found on pages 407 to 410 of the Transcript of Record shows that the settlement in the foreclosure proceedings between the Franklin Savings Bank and the guardian *ad litem* of the minors was not brought directly to the attention of Judge Blodgett, by whom the foreclosure decree was entered, and his cross-examination, found on page 486 of the abstract of records shows that the consent of Mr. Taylor, the father of the infant defendants, was reluctantly obtained, and after the guardian *ad litem* had concluded to make a settlement whether he was willing or not. Judge Blodgett entered the foreclosure decrees, and also the decree of the Circuit Court of the United States in this cause, and must have known whether or not his attention was drawn directly to the facts in the foreclosure case.

The "Burnt Records Act" of the state of Illinois contains the following provisions:

"Said decree of said court when entered on either of "the petitions above mentioned (*i. e.*, a petition to "establish title and petition to establish lien) shall be "forever binding and conclusive unless an appeal be

"taken during the term of court at which the decree "shall be rendered, or a writ of error shall be sued out "within twelve months from the entry of said decree, "in which case the final decree entered in said cause "shall be binding and conclusive as aforesaid from the "entry thereof, except against minors and insane per- "sons. * * * And provided further, that married "women, insane persons and minors shall have two "years after their disabilities are removed to prosecute "writ of error from said decree. * * * And pro- "vided further that in all decrees against infants, "persons of unsound mind or married women claiming "property in their own right, other than right of dower, "the decree shall set forth the evidence upon which it "is based."

BRIEF AND ARGUMENT.

It is respectfully but most earnestly urged that this court should exercise its right to review the proceedings of the Circuit Court of Appeals in this case, because of the grave importance of the questions involved in the issue, and of the irreparable injury liable to arise from the opinion of the Appellate Court if permitted to remain unimpeached, and therefore likely to be followed as a precedent. These conclusions are apparent upon an examination of the opinion of the Circuit Court of Appeals, because:

First.—That opinion disregards the rule that the estate of infants is under the special care and protection of courts of equity, and holds that the money of the bank is of more importance.

Second.—It holds that infants cannot attack decrees and other proceedings, and have them set aside because of fraud upon their rights as against parties who acted under them while they were in force.

Third.—It holds that the law of constructive notice arising from filing a written instrument for record can be conclusively overcome by a decree of the court obtained by fraud.

Fourth.—It holds that all decrees which have been affirmed by a court of appellate jurisdiction cannot be attacked by bill of review or original bill, though founded on fraud and entered in a cause in which no service was had on infant defendants without the right is reserved in the decree, or leave obtained.

Fifth.—It establishes a precedent by which guardians and trustees of the estate of minors may deprive their wards of their estates by means of fraud.

I.

The statement of the facts shows that the questions involved in this controversy relate entirely to the rights of these infant petitioners, and their brothers and sisters, and the judge of the Circuit Court of the United States (Judge Blodgett) in his opinion states "the

"essential question" to be "*Can these infants attack these "decrees and have them set aside as against parties who "acted under them while they were in force?*" but this view of the case is not recognized by the United States Circuit Court of Appeals, for it is stated in its opinion that, "*The essential question before us is whether the "savings bank under any of the decrees mentioned had "acquired rights which ought to be protected.*"

In the one court the rights of the infants were of the first importance, in the other the money of the bank received the first consideration.

The one court recognized the rule that, "The court "of equity is the general guardian of all infants within "its jurisdiction, and it is one of the most sacred duties "to watch with a vigilant eye and see that their rights "are not trifled away or sacrificed, and that they are "not made the prey of either strangers or their own "kindred. They are incapable of protecting their own "interests, and hence cannot be guilty of laches."

Smith v. *Sackett*, 5 Gil., 544.

Hartman v. *Hartman*, 59 Ill., 103.

Perry on Trusts, Sec. 603.

White v. *Glover*, 59 Ill., 459.

Loyd v. *Malone*, 23 Ill., 43.

Loyd v. *Kirkwood*, 112 Ill., 329.

While the other ignored it and pronounced the investment of the bank to be more important.

From the above rule, and the authorities cited, it is insisted that the question at issue is not, Can the bank

be protected? but, Shall the property of helpless children be confiscated despite the express provisions of a deed of trust executed for their benefit?

It would seem that the conclusion cannot be escaped that here was a fundamental mistake which led the court to at least resolve all doubtful questions in favor of the bank, even if the mistake had no more detrimental influence on the case of these petitioners.

II.

As to the rights of infants to attack decrees and other proceedings and have them set aside because of fraud upon their rights it is insisted that where an improper decree has been made against infants, although without actual fraud, it might be impeached by an original bill.

Whitford's Eq. 191.

Story's Eq. Pl., 427.

Adams' Eq., 420.

I. P. Wms., 737.

3 Ves., 232.

"It is the duty of the courts to exact a rigorous de-
"fense of their interests."

Sconce v. *Whitley*, 12 Ill., 150.

"In all suits brought against infants the law sup-
"poses them to be incapable of understanding and
"managing their own affairs, and the duty of watching
"over their interests devolves in a considerable degree
"upon the court."

Bank of U. S. v. *Ritchie*, 8 Peters, 144.

"No answer or admission by or in behalf of an in-
"fant can exonerate the plaintiff from his duty in prov-
"ing as against the infants the whole case upon which
"he relies."

Daniels, Chy., 169, 170.

Rogers v. *Smith*, 4 Pa., 93.

Holder v. *Hearne*, 1 Beav., 445.

Mills v. *Dennis*, 3 Johns. Ch., 367.

Massie v. *Donaldson*, 8 Ohio, 337.

Laches cannot be imputed to infants.

Smith v. *Sackett*, 5 Gil., 534, *supra*.

Morgan v. *Herrick*, 20 Ill., 481.

Rogers v. *Smith*, 4 Pa., 93.

Matthews v. *Dobschuetz*, 72 Ill., 438.

Gouch v. *Green*, 102 Ill., 509.

The bill and cross-bill both state in effect that the decrees complained of were procured through fraud, either actual or constructive; but even though the decrees were obtained by a mere error, they can be impeached by these infants by an original bill.

Loyd v. *Kirkwood*, 112 Ill., 337, *supra*.

Kuchenbeiser v. *Beckert*, 41 Ill., 172.

Loyd v. *Malone*, 23 Ill., 43, *supra*.

Daniels, Chy. 164–173, Note 2.

I. P. Wms., 737, *supra*.

The amended bill and cross-bill in this case having been filed for relief from decrees obtained through constructive if not actual fraud, the complainants are not

bound to offer to repay to the defendants the money claimed to have been expended upon the property or otherwise.

The appellant, the Franklin Savings Bank, having been a party to the suit establishing and setting up the fictitious deed of trust in lieu of the true one, and also to the mechanics' lien suit, does not occupy the position of an innocent purchaser or investor of money, and is not protected by the decrees, but is charged with notice of all fraud and error with which said decrees may be tainted.

The *bona fides* which lies at the foundation of the protection courts extend to purchasers under decree, does not exist in this case.

Freeman on Judgments, 513.

Loyd v. *Kirkwood*, 112 Ill., 338, *supra*.

The Circuit Court of Appeals does not directly undertake to overrule the foregoing authorities, but by its course of reasoning might as well do so, for the protection given infants by the rules above quoted would be entirely nugatory if they could be evaded in the manner which the Circuit Court of Appeals undertakes to do.

The Franklin Savings Bank was a party to the suit commenced in the Superior Court of Cook county, in January, 1873, under the "Burnt Records" Act for the purpose of restoring the deed of trust supposed to have been destroyed by the fire of 1871, and in which the decree was rendered that by its terms changed the provisions of the said deed of trust so that the trustee might

encumber the estate of these minors, thereby working a fraud upon their rights, of which the said Franklin Savings Bank must have had constructive notice at least. In the proceedings commenced in July, 1873, by which a trustee was appointed in August of that year, whose powers and duties were based upon the prior decree of the 20th of March, the Franklin Savings Bank was not a party, and because of that fact the Circuit Court of Appeals undertakes by a jugglery of words to show that they were put in the position of innocent third persons, and therefore came under the qualifications of the rule stated in *Loyd* v. *Lockwood*, 112 Ill., 388, which qualification we submit has no application in this case. This decree of August 19, 1873, has not been set aside by the decree entered in the United States Circuit Court in this cause, nor in any way disturbed.

If the qualification of the rule in *Loyd* v. *Kirkwood* is susceptible of the construction given, then to make a decree obtained by fraud binding and absolute, it is only necessary to commence another proceeding and have it re-affirmed, a piece of information most valuable to the fraternity of rogues.

The Circuit Court of Appeals may have misapprehended the contention of the appellees as to the decree of August 19, 1873. It was never contemplated by counsel for the appellees that that was a supplemental decree, nor a decree in aid of the "Burnt Records" decree, and therefore neither conclusive upon minors nor a source of protection to the bank.

What counsel intended to contend for, but failed evidently to make that court understand, was that the scope of the bill and decree in that cause was merely the appointment of a new trustee, and authority for him to reimburse Mr. and Mrs. Taylor for the cost of the improvements of the property. If, as we understand, the scope of a bill is limited to the prayer for relief, the above is all that was or could be accomplished by the decree in that case.

It was not necessary that there should be findings as to the terms of the trust when the bill contained no such prayer, the only occasion for the suit being the refusal of Trustee Scott to act. See testimony of Taylor, Transcript of Record 325.

While it is true that the bill for the appointment of a new trustee contained "original and direct averments of "the execution and provisions of the lost deed" as stated in the opinion herein, yet an examination of that bill discloses the fact that there was a copy of the deed as restored by the "Burnt Records" decree attached to the bill as a part thereof, which fact, coupled with the reference to the decree establishing it, leaves no room for the hypothesis that such "original and direct averments" would have been inserted, omitting such reference to the former decree. While the bill was an independent one, as the court says, yet the averments of the bill were not independent, but were manifestly dependent upon each other, and the court has no right to suppose a case based upon a part only of such averments.

The language of the decree of August, 1873, must be construed with reference to the prayer of the bill, which asks merely for the appointment of a successor in trust.

To establish the terms of the deed of trust to Scott was no part of the relief prayed for, and was not the object of the bill. The only reference to the terms of the deed of trust was an incidental reference, and a reference to a deed and suit in which the bank was a party, and where the bank was a party chargeable with all defects and errors.

As it was there clearly not intended, as shown by the prayer for relief and the general scope of the pleadings, to establish the terms of the deed of trust, the bank cannot rely upon it.

Graham v. *Railroad Co.*, 3 Wall., 704.

Good faith required the bank to take notice of the fact that such reference was made to the former decree. It was put upon its inquiry.

The bill of August, 1873, expressly says:

"And your orators further show unto your honors that, on the 3d day of March, A. D. 1873, a decree of this honorable court was entered on the chancery side thereof restoring the title to said trust estate, and establishing said trust conveyance to have been and to be the same as 'Exhibit A.'"

The decree of August, 1873, finds:

"That 'Exhibit A,' which is attached to the bill of "complaint in this cause, is a correct copy of the said "deed to Ira Scott."

The bank was chargeable with notice, as shown by pleadings, decree and evidence, that the finding as to the contents of the deed of trust to Scott was founded solely upon the findings and decree in the "Burnt "Records" case. Even a party purchasing at a judicial sale is charged with notice of such material facts as the record of the proceeding under which he claims title discloses, and he will be presumed to have examined the same before becoming a purchaser.

Webber v. *Clark*, 136 Ill., 256–270.

Smith v. *Hurldon*, 134 Ill., 24–31.

The bill and proceedings under which the decree of August 19, 1873, was made contained none of the features of a "Burnt Records" bill necessary to give the court jurisdiction, and the decree cannot be given the effect of a "Burnt Records" decree, that of restoring the records. As to the averments necessary to give the court jurisdiction in the case of a "Burnt Records" proceeding, see

Vol. 2, Starr and Curtis Statutes, Chap. 116, Sec. 16.

Gage v. *Carraher* 125 Ill., 447–452.

Smith v. *Hutchinson*, 108 Ill., 662.

Gage v. *Dupuy*, 134 Ill., 132–134.

As the necessary allegations in the bill are not inserted in the bill of 1873, the bill cannot be considered as a bill under the "Burnt Records Act," which is entirely a statutory proceeding; but such bill of August, 1873, can be considered as one merely to appoint a successor in trust to Scott.

Gage v. *McLaughlin*, 101 Ill., 155.

In all proceedings relating to real estate federal courts are bound and must follow the law as laid down by the decision of the Supreme Court of the state where the land is situate.

Gormly v. *Clark*, 134 U. S. R., 338.

Ridings v. *Johnson*, 128 U. S. R., 212.

Bacon v. *Insurance Co.*, 131 U. S. R., 258.

Hanrick v. *Patrick*, 119 U. S. R., 156.

The decree of August, 1873, in any event was binding only on the parties and privies (Story's Eq. Jur., Sec. 406, 10th ed.), and was available as protection only to them. The bank was neither, and consequently cannot invoke its protection.

Mr. Justice Story lays down the rule (Story's Eq. Jur., Sec. 407, 12th ed.): "In general a decree is not "constructive notice to any persons who are not parties "or privies to it, and therefore other persons are not "to presume to have notice of its contents."

Let us assume that the facts are reversed; that the true deed of trust conferred ample powers upon the trustee to mortgage the property; that the decree of August 19, 1873, found the deed to be without such powers, and decreed that the trustee thereby appointed as successor in trust under such trust deed shall make no mortgage; and that such trustee so appointed did in fact make such mortgages as the trust deed itself authorized, and the bank subsequently invested its money in such mortgages while such decree was in

force. Would it be held by any court that the bank was bound and concluded by such decree, and that it should lose its investment? Could not the bank claim that the trust deed governed its rights? Could such a decree be invoked to defeat the claims of the bank? and if not, can the bank, any more, in the case at bar set up the decree of August 19, 1873, against these appellees? Estoppels must be mutual. That decree, we submit, was binding only upon the parties; it was *res judicata* only between the complainants and defendants thereto and those claiming under them. The bank claims under Mulliken, the trustee, who was not a party to that decree, and was not bound thereby. Notwithstanding the decree, Mulliken was bound by the terms of the true deed of trust. He was appointed as successor in trust to Ira Scott "under said trust conveyance, and in accordance with the terms thereof, and "for the uses and purposes therein expressed." This is the language of the decree.

The court will observe that the decree does not state that he was to act under the terms of the deed of trust as restored, but under the deed itself as made to Scott.

Again in the decree is found the following:

"And it is herein and hereby further ordered, ad-
" judged and decreed that the said Charles H. Mulliken,
" as such successor in trust, shall and does hereby be-
" come fully vested with all the powers in and by said
" trust conveyance conferred on and subject to all the
" limitations therein and thereby imposed on said Ira

"Scott as such trustee"—not the deed as restored, nor as set up in the bill and decree appointing him, but as made to Scott.

The language of this decree, which, as we understand, is held to authorize Mulliken to mortgage the property, is as follows:

"And it is hereby further ordered, adjudged and de-
"creed that the said Charles H. Mulliken, as trustee,
"be and he is hereby authorized and empowered out
"of any funds arising from the sale of said premises,
"or any part thereof, or from any loan made for that
"purpose, to pay and discharge to the said Frank C.
"Taylor and Maria L. Taylor all the costs of said im-
"provements so, as aforesaid, advanced and paid by
"them, or either of them, not to exceed in amount the
"sum of $53,700."

This provision is easily referable to other ways of borrowing money than by mortgaging the estate. It is admitted that it does not in terms authorize those mortgages, but it is held to do so in effect.

We submit that it does not necessarily do so in effect. There might be many other ways of procuring a loan for the purpose specified. A mortgage or hypotheca tion of the rents might have accomplished the purpose, or an unsecured loan would have been legally possible. Besides, the terms of the trust deed, as restored, provide for mortgaging only for the purpose of making improvements. It did not authorize mortgages for the purpose of paying off the debts; certainly not to pay

debts the trustee or trust estate did not owe; and it is not to be presumed that the court intended to authorize a violation of the terms of the trust when some other reasonable construction can be placed on the language of the decree.

It is admitted in the opinion filed herein by the United States Circuit Court of Appeals that the bank cannot claim the protection of the "Burnt Records" decree, because it was party thereto and for other reasons; and yet, the court, in discussing the question of notice, at the foot of page 522, Transcript of Record, apparently gives great weight to the evidence taken in that case.

In view of the fact that the "Burnt Records" decree has been eliminated from consideration, it would seem that the whole case should go with it.

We suggest, also, that inasmuch as the master's report is not embodied in the decree in that case, it is hardly correct to say that setting forth the evidence in the master's report is a "substantial compliance with "the requirements of the 'Burnt Records' Act," that the evidence shall be set forth in the decree.

Manifestly that is no sort of compliance with the statute.

The decree is enrolled and preserved in the chancery record, but the master's report is simply filed and cannot be relied on to preserve such evidence, which was evidently the purpose of the statute.

We submit, however, that this was a circumstance not to be considered as bearing on the question of notice.

III.

In reference to the constructive notice arising from filing written instruments for record being overcome by a decree of the court, we desire to call attention to the distinction between the effect of the recording of a deed as notice, and the record of a deed as evidence, which seems to have escaped the attention of the Circuit Court of Appeals, and by reason of which its opinion practically annuls this rule of Illinois law arising from statutory provisions. The recording of a deed is constructive notice of what the deed contains.

This is true whether the record thereof is correct or not.

It is the act of recording—the filing for record—that constitutes the notice.

Nattinger v. *Ware*, 41 Ill., 245.

Haworth v. *Taylor*, 108 Ill., 275.

Kiser v. *Houston*, 38 Ill., 363.

A deed is recorded when filed in the proper office.

A deed is constructive notice in Illinois from date of filing for record, although the recorder fails to record it,

Polk v. *Cosgrove*, 4 Biss., 437.

or records only a part of it,

Riggs v. *Boylan*, 4 Biss., 445.

When left with the recorder it becomes notice to subsequent purchasers, and an error in copying or failure to record it does not affect grantee's rights.

Merrick v. *Wallace*, 19 Ill., 486.

So while it is true, as stated in the opinion (p. 523), that the "record of a deed is not final and conclusive "proof of the contents or tenor of the original instru- "ment," the recording—the act or fact of recording (which is complete upon filing the instrument with the proper officer)—is notice of what the deed really is.

Hence the effect of such notice, once given, cannot be avoided by any evidence as to what the record contains.

The notice is to all the world, and once affected with such notice all persons dealing with the property do so charged with such notice.

Whether a "decree declaring the terms or tenor of "an instrument to be different from the record of it, "supersedes or overcomes the latter as evidence," is not the question.

The record as evidence and the recording as notice, are entirely different matters.

We could safely admit that "the decree of August "19, 1873, superseded the destroyed record as evidence, "and that the decree became conclusive evidence of what "that record had shown"; but we submit it does not logically follow that it overcame or superseded the effect of the notice given by the fact or act of recording.

The effect of such constructive notice is exactly the same as in the case of actual notice.

Can it be contended that if this bank had had notice of the terms of the trust deed—had possession of the

deed, for instance—it would have been relieved of the legal effect of such notice by the fact that a decree had been made in a suit, to which it was not a party, declaring the deed to be other than it really was?

If not, then we submit it cannot be relieved of the effect of such notice here, for there is no difference in principle between the cases.

Moreover, it should be borne in mind that the decree of August 19, 1873, did not pray for establishment of the terms of the deed, nor for any construction of the same.

The court is not considering a general question of law, but the construction given to statutes of Illinois by the recording of a deed. It is a question of local Illinois law, not that of any other state.

The rule as to constructive notice given by the recording of a deed in Illinois is not founded (as the United States Circuit Court of Appeals in its opinion, p. 523, says) on public policy, but on the interpretation of a state statute.

Willoughby v. *Lawrence*, 116 Ill., 11–21.
Cook v. *Hall*, 1 Gil., 575.
Bevell v. *Jeffreys*, 4 Scam., 387.
Merrick v. *Wallace*, 19 Ill., 486.
Kizer v. *Heuston*, 38 Ill., 252.
Nattinger v. *Ware*, 41 Ill., 245.
Haworth v. *Taylor*, 108 Ill., 275.
St. John v. *Conger*, 40 Ill., 535.

In the cases of *Farrar* v. *Payne, et al.*, 73 Ill., 82, and *Heaton* v. *Prather*, 84 Ill., 330, the Supreme Court of Illinois held that where a trust deed was given to a trustee, which trust deed was foreclosed under power of sale, but the purchaser did not record his deed, a subsequent purchaser of the equity of redemption without notice of the trust deed could not hold the land as against the purchaser under the trust deed; that although the record of the trust deed was destroyed by the fire, the fact of the recording gave notice to subsequent claimants of the equity of redemption, and pointed out the source of information of what might be done in pursuance of the deed, and they were bound to take notice of the proceedings thereunder.

Apply the rule here and we come irresistibly to the conclusion that the fact of recording gave such a notice of the trust deed that purchasers and incumbrancers were bound to take notice of the want of powers of the trustee or any one else to incumber the property.

Moreover, as we have shown, the proceedings, evidence, bill and decree of August, 1873, referred distinctly to the "Burnt Record" decree, under which this court admits the bank cannot claim protection. If the bank cannot claim protection under the "Burnt Record" decree, how can it under the decree of August, 1873, which refers to and is based upon the "Burnt Record" decree?

The Court of Appeals seems to hold that constructive notice differs in its effect from actual notice under the statutes of Illinois. (Opinion, p. 523.)

The Supreme Court of the United States in *Simmons Creek Coal Co.* v. *Doran*, 142 U. S. R., 417, through Chief Justice Fuller, cites with approval language in the opinion in *Burwell* v. *Fauber*, 21 Grat., 446–463, as follows:

"He is bound not only by actual, but also by constructive notice, *which is the same in its effect as actual notice.*"

The same court in the same case, citing Story's Equity Jurisprudence, section 399 (twelfth ed.), says: "Constructive notice is in its nature no more than evidence "of notice, the presumption of which is so violent that "the court will not allow of its being controverted."

In this same edition of Story on Jurisprudence, there is added to the foregoing citation:

"Or, as has been elsewhere defined, constructive notice is knowledge imputed by the court on presumption too strong to be rebutted; that the knowledge "must have been communicated."

Yet the Court of Appeals says in its opinion that it would not be even held in a court of law that the constructive notice given by the recording of the deed of trust to Scott was notice to the bank that the trustee could not encumber the property. We ask the court to carefully examine the authorities of this state as to our recording law before laying down such doctrine.

As we understand the law, this holding is flatly opposed to all authority, and especially to the decisions of

the Supreme Court of Illinois, which in this case are binding on this court, in reference to the recording act of this state.

Judge Blodgett, as eminent an authority on the laws of real estate in Illinois as can be found, says in his opinion: "It is undoubtedly settled beyond ques- "tion by the decisions of the Supreme Court of Illinois, "which controls this court in all cases involving rights "to real estate in this state, that the record of the deed "to Mr. Scott was notice to all persons dealing with re- "spect to the trust property, that no valid lien could "be created upon that property either by the trustee "or any of the beneficiaries under the trust, and that "the destruction of the record of the deed of trust did "not change the rule as to its effect as notice." (Citing cases.)

We respectfully submit this decision by so eminent an authority and a former member of the United States District Court should not be lightly disregarded.

IV.

The opinion of the United States Circuit Court of Appeals lays down the dangerous doctrine that the decree in the Gilsdorff case cannot be attacked by an original bill, or by a bill of review, because the right was not reserved or leave obtained of the Supreme Court of Illinois for that purpose, the decree having been affirmed by that court, even though such decree

was based upon a contract made by parties who had constructive notice of the rights of these minors, and the farther fact that these petitioners were not served with process in that cause, and cites in support of its position the case of *Southard* v. *Russell*, 16th How., 547–570, and *Kingsbury* v. *Buckner*, 134 U. S., 650. As these cases and the reasons upon which they are based have been most thoroughly and ably reviewed by Mr. Pope and Mr. Grant, counsel for the appellees in the Circuit Court of Appeals in their brief, we quote from the same at length as follows:

"If, as a matter of law, the principle of *res judicata* cannot be applied so as to render the Gilsdorff decree a bar, because the matters in dispute are different, it would seem that the point made by counsel, that the Gilsdorff decree cannot be set aside by a bill of review, on the authority of *Kingsbury* v. *Buckner*, *supra*, is not well taken."

But waiving for the sake of the argument this point, counsel have unmistakably misapprehended the scope and effect of the decision in the Kingsbury case. The Kingsbury case was where a decree below had been entered by order of the state Supreme Court. (See statement of facts in the 134 U. S. R. case, also Judge Harlan's opinion, foot of page 672.) It was sought to review this decree by original bill filed in the lower state court without any application to, or leave from the state Supreme Court entering the decree.

Judge Harlan says, quoting from *Southard* v. *Russell*, 16 How., 547–570:

"As already stated, the decree sought to be set "aside by this bill of review in the court below was en- "tered in 'pursuance of the mandate of this court on "an appeal, in the original suit.' It is, therefore, the "decree of this court and not that previously entered by "the court below that is sought to be interfered with."

The bill in the Southard case was a bill of review, and the bill in the Buckner case was an original bill. The decrees in these cases (the Buckner and Southard cases) were decrees entered in the lower courts by direction of the Supreme Courts. In other words, both decrees were decrees of Supreme Courts. Both bills were filed without leave of the Supreme Courts.

As a matter of course, a Supreme Court will not allow a lower court to disturb a decree directed to be entered by the Supreme Court without such Supreme Court first giving permission to attack what in effect is its own decree. In other words, a lower court cannot correct, disregard or set aside except for fraud or want of jurisdiction, a decree of an upper court.

Such a holding does not touch the case at bar. The Gilsdorff decree was entered by the lower state court, and the state Supreme Court by its mandate (Trans., 140, 141, 147) merely affirmed the decree of the lower court as being on its face without an error.

Moreover, the amended bill in the case at bar asserts that a totally different state of facts really existed from

that which was shown by the record in the Gilsdorff case. The amended bill in the case at bar charges false statements to have been made by the petitioner Gilsdorff in his petition as to the contents of the Ira Scott deed of trust (Trans., 25). The bill charges also that a pretended deed of trust, or a copy thereof, was put in evidence instead of the real deed of trust (Trans., 26, 27), and that in reality there was an utter want of power in the Circuit Court, on account of the provisions of the genuine deed of trust to encumber by a decree the trust property in suit. The bill further charges (Trans., 26, 27) that the Gilsdorff decree was obtained by "misrep-"resentation and imposition upon said Circuit Court," and sets out how said Circuit Court was imposed upon by the production of said pretended deed of trust. These averments are amply supported by the proofs. In the Kingsbury case Judge Harlan expressly said *that even as to the decree entered by direction of the Supreme Court in the lower court*, if said decree had been obtained by fraud, as distinguished from mere error, or collusion with the guardian *ad litem*, so that the decree was the result of a case not a genuine one, but the proceedings in the state court were continued, and so conducted throughout for the purpose of depriving an infant of his estate, without bringing attention to the real merits of his claim to the property in dispute, then even such decree entered by direction of the Supreme Court, would constitute no obstacle in the way of giving relief. The federal Supreme Court then considers

the grounds upon which fraud and collusion are charged, and decides that no grounds exist for such charges in the Kingsbury case.

Judge Harlan also starts out by expressly saying (p. 682): "It may be observed that no claim is made "of newly discovered evidence, and that all the facts "now relied upon to show fraud and collusion were dis- "closed by the record before the Supreme Court of "the state upon the first appeal. No effort has been "made to prove any state of case different from that "disclosed in the original and cross-suit." All this shows a totally different state of facts from that shown by the record of the case at bar.

The opinion in the Kingsbury case does not hold (p. 672) that the infant Kingsbury had no right to file an original bill to set aside the decree of November 13, 1871 (entered by direction of the Supreme Court of Illinois), for errors apparent on the record, and for this reason, viz., that such decree was entered pursuant to the mandate of the Supreme Court of Illinois. But the point of the Kingsbury decision does not touch the case at bar, where the bill is filed on totally different grounds, and is not filed to set aside a decree entered by direction of the Illinois Supreme Court.

The citation from Lord Harwick's opinion, quoted by Judge Harlan, merely refers to an attempt to review a decree affirmed by a Supreme Court for mere errors of law on the face of the record, as the court will readily see on inspection. Judge Harlan clearly so understands it. (See 134 U. S., 674.)

The case of *Southard* v. *Russell*, 16 How., 547, cited by Judge Harlan in the Kingsbury case, was a bill filed by Russell in the United States Circuit Court for the district of Kentucky, to redeem from what he called a mortgage or conditional sale. Upon the trial the Circuit Court dismissed the bill, and Russell appealed. The case is first reported as—

Russell v. *Southard, et al.*, 12 How., 140.

The Supreme Court reversed the case, holding that the instrument was a mortgage, as claimed by Russell, and that he had a right to redeem therefrom. The cause was remanded to the Circuit Court "for further pro-"ceedings to be had therein in conformity to the opinion "of this court and as to law and justice may appertain."

The Circuit Court, at the May term, 1852, entered a decree in conformity with the direction and mandate of the Supreme Court, and in further pursuance of the opinion of the Supreme Court that the case was not then in condition for a final decree in respect to the other defendants, it was remanded to the rules. At the same time, viz., in June, 1852, Southard and others moved the court to file a bill of review of the decree rendered, and filed affidavits in support of the motion. The court granted the motion. The bill for review and answer thereto were filed, and in May, 1853, the Circuit Court dismissed the bill with costs upon the ground that "there is not sufficient cause for setting aside said decree "of the Supreme Court of the United States entered "here, according to the mandate of said Supreme Court."

From this decree the complainants appealed. The opinion of the court on the second appeal is recorded in the case of—

Southard v. *Russell*, 16 How., 547.

That part of the opinion cited by Justice Harlan was upon a question not argued, as appears by the court's note to that effect (page 570), reading as follows: "There is another question involved in this case, not "noticed in the argument, but which we deem it proper "not to overlook."

It appears from the opinion by Mr. Justice Nelson, and also from the facts, that, as stated by Mr. Justice Miller, "it was in the Southard case the decree of this (Supreme Court), and not that primarily entered by the court below, that is sought to be interfered with."

Defendant's counsel, in their brief, (page 65), in support of their contention, quote from the opinion in *Kingsbury* v. *Buckner*, 134 U. S., 650, the following:

"Nor will a bill of review lie in the case of newly discovered evidence after the publication, or decree below, where a decision has taken place on an appeal, unless the right is reserved in the decree of the Appellate Court, or permission be given on an application to that court directly for the purpose."

The foregoing paragraph did not originate with Justice Harlan, although defendant's counsel seem to have so regarded it, but was quoted by him from the opinion by Mr. Justice Nelson, in the case of *Southard* v. *Russell*, 16 Howard, 547, and may be found at the close of that opinion, on page 570.

It will be observed that this statement includes only by its terms a bill of review, while the case of the complainants in the present case is by an original bill.

The language above quoted is supplemented in the opinion where it first occurs, by the following: "This "appears to be the practice of the court of chancery and "House of Lords in England, and we think it founded "on principles essential to the proper administration of "the law, and to a reasonable termination of litigation "between parties in chancery suits." Citing:

1 Vern., 416.
2 Paige, 45.
1 McCord's Ch., 22, 29, 30.
3 J. J. Marshall, 492.
1 Hen. & Munf., 13.
Mitford's Pl., 88.
Cooper's Pl., 92.
Story's Eq. Pl., 408.

The foregoing statement, together with some matter immediately preceding it, as to review for error, was added as an additional objection to the appellants' case at the end of a long opinion in which the only question discussed and considered was whether the newly discovered evidence set up in the petition for leave to file a bill of review, was of such a character as to lay a foundation for a bill of review. The court decided that the newly discovered evidence was not of such a character, and then remarked that "there is another question in-"volved in this case, not noticed on argument, but which

"we deem it proper not to overlook," and then, after stating the foregoing as a rule, remarked that, "neither "of these prerequisites to the filing of the bill before us "have been observed."

The case was really disposed of upon the questions argued, which the court fully considered in its opinion, notwithstanding the omission of such "prerequisites." This statement, made under such circumstances, of the supposed rule of practice in England, has, therefore, hardly the force of a decision, even as applied to a bill of review, certainly not to an original bill, or bill in the nature of a bill of review, based on a new matter.

An examination of the cases cited in *Southard* v. *Russell* in support of the dictum shows that *Barbon* v. *Searle*, 1 Vern., 416, was a bill partly original and partly a bill of review, setting forth that the plaintiff had been relieved as to a moiety of personal property, and dimissed as to the real, by the order made by the peers in Parliament, but that the defendant had suppressed evidence, and had, pending the appeal, burnt the deed (as plaintiff had since discovered) that made out the plaintiff's title. The bill was for discovery of that matter, in order that plaintiff might be "capacitated" to apply to the House of Lords for relief.

Upon demurrer the court ordered the defendant to answer, but when he had done so, for the plaintiff to proceed no further without leave of court.

There is no opinion by the chancellor in the above cause, simply the order. The points of argument of coun-

sel are stated in the report, defendant's counsel arguing that no bill of review would lie in that court, after judgment upon appeal in the House of Lords; and plaintiff's counsel arguing that where there was only a "dismission" an original bill might be brought upon a new equity, etc., and disclaiming "that this court could "alter the order of the House of Lords." This was A. D. 1686.

The South Carolina case cited (I. McCord's Chy. R., 22, 29, 30, Maj. Haskell v. Col. Thompson) contains the following: "In England bills of review are granted for two causes: 1, the discovery of new matter which has come to the knowledge of the party after the determination of the cause. 2, for error in the decree itself, which must be error in law. And it is, at least, doubtful in England whether a bill of review would be granted after an affirmance of a decree by the House of Lords. It is certainly the usual course of the court to refuse them."

There is nothing in this case that bears out the contention that it is necessary to make application to the Supreme Court for permission to file an original bill on the ground of newly discovered evidence, nor even a bill of review.

In a foot note to the above case it is stated that in a subsequent case a petition was presented to the appeal court in equity for leave to file a bill of review, and that an order was entered as follows: "The petition neither granted nor refused, but Mr. Green is left to pursue his own course by bill of review in the Circuit Court."

The citation to Mitford's Pl., 88, fails also to sustain the point, as it is there stated that "a bill of review upon new matter discovered has been permitted even after an affirmance of the decree in Parliament; but it may be doubted whether a bill of review upon error in the decree itself can be brought after affirmance in Parliament."

Almost the identical language as the last above is used at the place cited in Cooper's Pl. (p. 92).

The foot note in both books refers to the case in I Vern., hereinbefore mentioned.

Story says, Sec. 408: "Where a decree has been affirmed in Parliament, it may well be doubted whether a bill of review for errors apparent upon the face of the decree can be brought; for the highest Appellate Court has pronounced, in effect, that it is not erroneous. The same objection does not apply (as we shall presently see) where the bill of review is for matter of newly discovered evidence." (Sec. 418.)

The case cited in I Henning & Munford's Reports (Va.) was an application to the Supreme Court for leave to file a bill of review for error, and also on the ground of discovery of new matter, in a case that had been to the Court of Appeals.

The court held that, "So much of the bill of review as seeks a reversal of the decree, for error complained of in the proceedings, which have been before the Court of Appeals, this court must reject, because it has no power to revise the decisions of that court" (p. 14).

* * * "The rule is, that a bill of review may be brought upon error of law appearing in the body of the decree itself, or upon discovery of new matter. Under the former part of this rule, for reasons already assigned, this court is clearly without power to act upon the subject; but under the latter part of the rule it may, and if the evidence should warrant it, should act" (p. 15).

In the case cited from 2 Paige, 45, *Stafford* v. *Bryan*, Chancellor Walworth said: "If this court can review, on new evidence, a decree affirmed in the court of last resort, it can also review a decree which has been reversed there; but I doubt the authority of the chancellor to do it in either case, unless the court has expressly reserved to him that right."

As the chancellor held that the facts were not sufficient to authorize the filing of a bill of review he did not decide the question of power, but contented himself with the above expression of doubt.

This appears to be the only intimation in any of the cases cited in *Southard* v. *Russell* that the right to file a bill of review of an Appellate Court decision, for newly discovered evidence, should be reserved in the decree of the Appellate Court itself, and it may well be doubted that any such reservation was ever made. It is difficult to conceive of a case where such a reservation would be thought of in actual practice.

The remaining case cited in *Southard* v. *Russell* on the point in question—*Brewer* v. *Bowman*, 3 J. J.

Marshall (Ky.), 492—not only fails to sustain the proposition that the right to file a bill of review for newly discovered evidence must be reserved in the Appellate Court decree, or permission must be given upon application to that court directly, but practically recognizes the right to proceed in the lower court, as had been done in that case. This case was decided wholly on the ground of insufficiency of the new matter alleged, and no objection was made to the mode of procedure.

The right of infants, after attaining full age, to apply to the court to open the decree, was recognized, and the court suggested they should make such application (without specifying which court; but as the case came up from the Circuit Court, and no objection was made to the jurisdiction, it must be presumed the Court of Appeals referred to the same course of procedure).

Additional force is given to the analysis of these authorities by the well reasoned and well considered case of—

Putnam v. *Clark*, 35 N. J. Eq. R., 145,

decided by the New Jersey court of errors and appeals, on appeal.

The deductions to be drawn from these authorities would seem to be:

First.—That the decisions in cases of *Kingsbury* v. *Buckner*, *supra*, and *Southard* v. *Russell*, *supra*, must be confined to the class of cases to which they both belong, and to the points expressly decided by them, viz.,

to cases where the decree of the lower court is entered in accordance with instructions sent down from the Supreme Court. In other words, where the decrees in the Circuit are the decrees in effect of the Supreme Court, and where it is sought merely by a bill of review or a bill in the nature of a bill in review or an original bill filed in the Circuit Court to review such decree without leave of the Supreme Court for errors on the face of the record, and not for want of jurisdiction or for fraud or collusion in procuring the entry of the decrees.

This principle contended for by us is well set forth by Judge Jackson in the case of—

Kimberly v. *Arms*, 40 F. R., 548, 554,

where the court says:

"We think the foregoing authorities establish the "rule that where a final decree has been entered in an "inferior court, under and in pursuance of a mandate "from the Supreme Court, such inferior court cannot, "without leave first had and obtained from the Supreme "Court, entertain a bill of review, at the instance of "the defeated party, to vacate or annul such decree. "Any other rule of practice would reverse the order of "judicial procedure, and permit the subordinate tribunal "to sit in judgment on the decree of its Superior or "Appellate Court. It should not be assumed that the "Supreme Court would deny such an application in any "case where leave to review its decision should properly "be granted."

Judge Jackson excludes (as will be seen from his opinion) cases of fraud or want of jurisdiction from the operation of this rule.

The case of *Jewett* v. *Dringer*, 31 N. J. Eq. R., 586, overruled in *Putnam* v. *Clark*, *supra*, is also in point here.

Jewett v. *Dringer*, 31 N. J. Eq. R., 586, is cited as authority by Judge Harlan in *Kingsbury* v. *Buckner*, *supra*, to sustain the proposition that no bill can be filed in the lower court to impeach a decree for errors apparent on the record, and which do not involve the jurisdiction of the court, when such decree was entered by direction of the Supreme Court. Upon this same proposition only does Judge Harlan cite *Southard* v. *Russell*, *supra*. *Jewett* v. *Dringer*, *supra*, expressly holds that an original bill may be filed in the Chancery Court, setting forth facts which would render it plain that it would be against conscience and right to let the winning party execute his judgment.

Judge Harlan plainly holds in the Kingsbury case that in cases of fraud or collusion an original bill can be filed even when the decree is in effect the decree of the Supreme Court.

Such is the holding also, as we have said, of Judge Jackson in *Kimberly* v. *Arms*, *supra*.

Second—When the decree of the Circuit Court is affirmed and the mandate of the Supreme Court has issued, the only course left is to perform the decree, and then apply to the Circuit Court for relief, setting forth

the new facts, either by original bill or by a bill in the nature of a bill in review, and setting forth the excuses as to why this evidence was not before introduced. This rule would not apply in cases of fraud or want of jurisdiction.

The reason of this rule, as deduced, is plain. When a decree of the Circuit Court is affirmed, and the mandate of the Supreme Court filed in the Circuit Court, there is nothing for the Circuit Court to do but to carry out the mandate of the Supreme Court. (*Durant* v. *Essex Co.*, 101 U. S. R., 555,556.) But when this mandate is obeyed, there certainly can be nothing to prevent the lower court entertaining a bill of review, founded on new facts. If it were desired to stay the execution of the mandate only, the supreme tribunal could be invoked for such a purpose, but when the mandate is executed, the Supreme Court loses jurisdiction of the case, and the Circuit Court only has jurisdiction over its own decree.

That this second deduction is justified is shown by the case of—

Ricker v. *Powell*, 100 U. S. R., 104.

Third—That the dictum in *Southard* v. *Russell*, *supra*, to the effect that a bill of review will not lie "in the case of newly discovered evidence after the publication or decree below, where a decision has taken place on an appeal, unless the right is reserved in the decree of the Appellate Court, or permission be given on an application to that court directly for the purpose," must be held to apply only to a case where the decree is in effect

the decree of the Supreme Court, as in the Southard and Kingsbury cases, or as merely stating the well recognized doctrine that upon the mandate being transmitted to the lower court the petitioner must first comply with the decree before he can file a bill of review, or show good reason why he has not done so. Otherwise the dictum must be considered as ill-advisedly uttered and as not binding, because a mere dictum and not necessary for the decision of the case, and as opposed to the current authorities as contended for in *Putnam* v. *Clark*, *supra*.

Upon this point may be cited as in consonance with *Putnam* v. *Clark*, *supra*, and authorities therein referred to:

Bleight v. *McIlroy*, 4 Mon., 142.

Singleton v. *Singleton*, 8 B. Mon., 345.

Bush v. *Maderia*, 14 B. Mon., 172.

We frankly say that we do not regard the dictum in *Southard* v. *Russell*, *supra*, as good law, but if applied to the facts as set forth in said last mentioned case, it does not apply to the case at bar. In addition, as we have said, the dictum expressly refers to a bill of review, and the case at bar is an original bill founded on both a different cause of action from that involved in the Gilsdorff case, and moreover is for fraud.

Fourth.—The points in which the case at bar differs, both from *Kingsbury* v. *Buckner*, *supra*, and *Southard* v. *Russell*, *supra*, and by reason of which these cases are not in point, may be summarized as follows:

(*a*) The Gilsdorff decree is a decree entered by the Circuit Court and is not in effect a decree of the state Supreme Court, whereas the decrees in both the Kingsbury and Southard cases are in effect decrees of the Appellate Courts.

(*b*) The Gilsdorff decree has been executed, and the rule contended for by appellants does not apply.

(*c*) The point for adjudication in this case is a totally different question from that raised in the Gilsdorff case. Here the point to be adjudicated is the right to encumber the property under the Scott deed of trust. In the Gilsdorff case it was the right to encumber the property under a supposed deed of trust, where the clause under consideration here was omitted.

(*d*) The complainants in the amended bill in this case were not parties to the Gilsdorff decree, and cannot be considered as bound thereby.

(*e*) The evidence now sought to be introduced by this new bill, appellants had constructive notice of, and the failure to introduce it worked a fraud upon these children, who appeal to the court to sustain their rights. This amended bill can be sustained on the ground of legal fraud, by which the entry of the Gilsdorff decree was procured.

(*f*) The statutes of Illinois give these children the right to file this bill, as construed by the Illinois courts, and the federal courts follow such decisions of the state in regard to titles therein.

(*g*) The bill in the present case is not a bill of review for error apparent on the record, but is an original bill based on newly discovered evidence and on fraud.

(*h*) The court never had jurisdiction of the infants, defendants in the Gilsdorff case, as process never was served upon them.

We desire also to call the court's attention to the remarks of Judge Blodgett referring to this branch of the cause, on page 69 of the Transcript of Record:

"In the Gilsdorff decree and sale under it, I can "see no reason why it is not properly the subject of at- "tack by this bill. Undoubtedly, at the time that de- "cree was rendered, the court properly assumed that it "was justified by the deed of trust as restored by the "decree of March 29, 1873, under the 'Burnt Records "Act,' but that decree was based upon a most palpable "error of fact, of which the bank and its president "were charged with notice, and it seems to me the right "of these infants to set aside that decree, and all that "has been done under it, is palpable."

Again, this objection that leave should have been had from the Supreme Court of Illinois, before the filing of the bill in this cause, is dilatory in its nature, and should have been made at the first opportunity by demurrer or plea. Such objection comes too late at the hearing.

V.

If this opinion of the Circuit Court of Appeals is allowed to stand as a precedent, it affords protection to

any designing trustee or unscrupulous guardian, who by a conspiracy with third persons takes the necessary steps pointed out in this case by which the infants' estate has been destroyed. The guardian would need only to employ some member of the bar to pilot him and his co conspirators through the successive steps by which the savings bank "acquired rights which ought "to be protected, notwithstanding the subsequent dis- "covery of the error upon which the decree was "founded."

By this sort of reasoning a decree entered by fraud becomes absolute if entered again, even though it be against helpless children who cannot protect themselves.

This sort of protection makes the law a disgrace and equity a mockery.

The conclusion of Judge Blodgett that "to hold that these incumbrances are valid as against the children would make precedent for defeating the rights of many more minor children" (Transcript of Record, 69), is inevitable.

The United States Circuit Court of Appeals apparently gives no consideration or weight to the fact that Mr. Taylor, the father of these children, was, during all the proceedings and until about two years after the giving of the mortgage, the agent for the bank in this whole business (see his testimony and also the various pleadings of the bank asserting this fact).

It would seem that as far as the law of agency is concerned it is as applicable to this cause as though Taylor

had been a stranger to the trust and had not sustained any family relation to the parties interested therein; that he was the husband and father did not change the rule of agency that a principal is chargeable with notice through an agent, and bound by his acts.

It is evident that Taylor instituted the suit in the Superior Court in order to give the bank satisfactory security. In this matter he was evidently acting in the interest of the bank, and in his own interest, and not as agent for his wife, nor in the interest of the trust estate.

If the court could have saved the estate of the children after the termination of the trust estate, it should have done so, even though holding that the equitable interests under the trusts should be held and enjoyed by the bank. The necessity to utterly destroy their estate does not sufficiently appear even upon the view the court takes of the equities of this case.

For these reasons we respectfully submit that a writ of certiorari should issue as prayed for in the petition herein.

EDWIN L. HARPHAM,
Solicitor for Petitioners.

JAMES L. CLARK,
Solicitor for Appellees, Frank C. Taylor, Maria L. Taylor, Josephine S. Taylor and Alexander Taylor.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM NO. 1171. GEN. NO. 16,858.

FRANKLIN SAVINGS BANK et al.

vs.

ROBERT C. TAYLOR et al.

Brief and Argument on behalf of Franklin Savings Bank in opposition to Petition of Robert C. Taylor et al., for Writ of Certiorari.

WILLIAM H. SWIFT,
THOMAS D. JONES,
SOLICITORS FOR FRANKLIN SAVINGS BANK.

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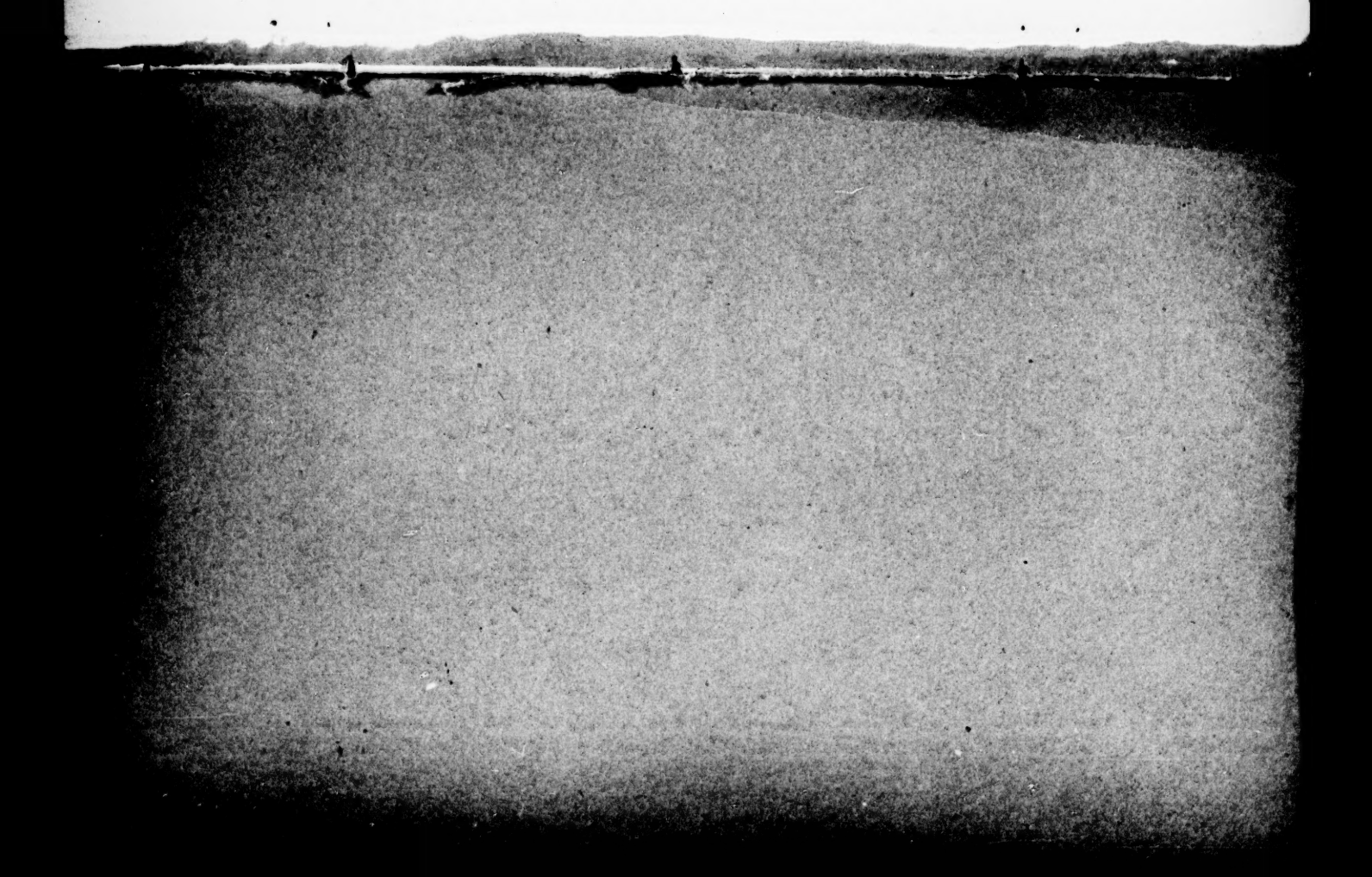

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM NO. 1171. GEN. NO. 15,555.

FRANKLIN SAVINGS BANK et al.

vs.

ROBERT C. TAYLOR et al.

Brief and Argument on behalf of Franklin Savings Bank in opposition to Petition of Robert C. Taylor et al., for Writ of Certiorari.

The opinion of the Circuit Court of Appeals in this case (53 Federal Reporter, 854) itself affords a most effective reply to the argument of counsel in support of the petition for a writ of *certiorari*. As that opinion is not contained in any of the documents served upon us by counsel for petitioners, we think it incumbent upon us to bring the opinion to the notice of this court in convenient form. We beg leave, therefore, to present that opinion to this court herewith as our argument in opposition to the petition.

To facilitate reference to the opinion, we would say that the Franklin Savings Bank holds title to the premises claimed by petitioners, derived from three distinct sources:

(*a.*) By sale under a foreclosure decree.

(*b.*) By sale under a decree in mechanic's lien proceeding described in the opinion as the Gilsdorf decree, and

(*c.*) By a conveyance made by the trustee under the power conferred by the trust deed upon which petitioners base their own claim.

The Circuit Court of Appeals found:

1. That the bank's title by foreclosure was fairly derived and is valid. (*Infra*, pages 18-20.)

2. That the bank's title under the Gilsdorf decree could not be inquired into under the allegations of the bill without leave of the Supreme court of Illinois, which had affirmed the decree on appeal, and that such leave was not shown. (*Infra*, pages 20–22.)

3. That the conveyance by the trustee (in which the father and mother of petitioners joined to express their concurrence) was an unimpeachable exercise of power conferred by the trust deed in its original form—an exercise of power which a court of equity might well have compelled if its jurisdiction had been invoked for that purpose. (*Infra*, pages 26–29.)

We find no reference whatever in the argument of counsel for petitioners to the last mentioned finding of the court. The title acquired by the bank under the conveyance mentioned is co-extensive with the title acquired by purchase under the two decrees mentioned. It follows that even if all the errors now alleged on behalf of the petitioners were shown to be actual and flagrant errors the only consequence would be a modification of the opinion of the Circuit Court of Appeals; its decision would remain unimpeached, supported by the view of the case which the court itself describes as the "broader and more equitable view." (*Infra*, page 26.) It would be a waste of time, therefore, to show that the alleged errors do not in fact exist.

Respectfully submitted.

William H. Swift,
Thomas D. Jones,
Solicitors for the Franklin Savings Bank.

OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN THE CASE OF FRANKLIN SAVINGS BANK ET AL. V. TAYLOR ET AL., 53 FED. REP., 854.

Before Harlan, Circuit Justice, Woods, Circuit Judge, and Jenkins, District Judge.

STATEMENT OF THE CASE.

The principal facts have been well stated by Judge BLODGETT in his opinion—50 Fed. Rep., 289—as follows:

"This is a bill to review, reverse, and set aside a decree of foreclosure, entered in this court on the 30th of April, 1880, under which defendant claims title to lots 1, 4, and 5 of the subdivision of lot 4, in block 16, in Bushnell's addition to the city of Chicago; and also to set aside a sale made July 15, 1881, under a decree for a mechanic's lien, in favor of Gilsdorff and others, entered in the Circuit court of Cook county, July 20, 1874. * * *

"The facts, as they appear from the proof, and which are not disputed, are, that on the 13th of June, 1871, Maria Louise Taylor, being seized in fee of all of lot 4, in block 16, in Bushnell's addition to Chicago, joined with her husband, Frank C. Taylor, in the execution of a deed of the premises to Ira Scott, to hold upon certain trusts, in the deed set forth, which trusts, so far as it is necessary to state them for the purposes of this case, were, that the property was to be held for the benefit of Mrs. Taylor and the children of the marriage between Frank C. Taylor, her husband, and herself, except that in the event of the death of Mrs. Taylor and of the children, before the youngest child had reached the age of twenty-one years, Mr. Taylor, or his heirs, should become entitled to the remainder of the estate. The deed of trust contained an express provision 'that no lien, incumbrance, or charge shall be created on said premises;' and although there was a provision in the trust deed that the trustee might sell some portion of the premises for the purpose of improving that which was unsold, yet the provision was so guarded as to prohibit the creation of any lien, incumbrance, or charge upon the unsold portion of said premises.

"At the time the deed was made there was a house upon the premises, which was occupied by Mr. and Mrs. Taylor as their home, this house covering only a comparatively small part of the lot. When this trust was created, three children had been born to Mr.

and Mrs. Taylor, and four have since been born, and this bill was filed by the three youngest of the seven children; the three oldest having arrived at lawful age since this bill was filed, and the other four are still minors.

"By the great fire of October 8 and 9, 1871, the house upon the trust premises was destroyed, and the public records of deeds of land titles in the city were also destroyed, and the trust deed itself was for several years supposed to have been destroyed by the same fire, although it had been duly recorded within a few days after its date. In January, 1872, Mr. Taylor borrowed the sum of $30,000 from the Franklin Savings Bank, the principal defendant in this case, for which he gave his own note, payable one year after date; and, to secure the payment of that note, he and his wife executed to Edward Brown a trust deed upon the whole of said lot 4, in block 16. The money so borrowed by Taylor was used in building upon the trust premises a block of five dwelling houses, which cost about $53,700. In January, 1873, Taylor and his wife filed a petition in the Superior court of Cook county, under the provisions of what is known as the 'Burnt Records Act,' of this state, alleging the making and recording of the deed of trust, the destruction of the records, and the loss of the deed itself, and praying an establishment and confirmation of the trust deed and its terms, as set out in said petition; and such proceedings were had under this petition that, on the 19th of March, 1873, a decree was entered establishing and confirming what was found, from the proof, to be a substantial copy of the trust deed, but in fact omitting the clause which provided that no lien, encumbrance, or charge should be created on the premises, and containing, in place of that clause, a clause that authorized the trustee to make liens for the purpose of rebuilding, etc.

"After the entry of this decree, Scott, the trustee, and Taylor and wife, made a subdivision and plat of said lot 4, dividing the same into five sub-lots, numbered from 1 to 5, inclusive.

"On the 22d day of July, 1873, Mr. Scott declined to act longer as trustee, and Taylor and wife filed a bill in the Superior court of Cook county for the appointment of another trustee, and that such new trustee be empowered to make a loan of money sufficient to reimburse them for the fair value and cost of the improvements made on said lots; and a decree was on the 19th of August, 1873, entered, appointing Charles H. Mulliken trustee, as successor to Mr. Scott, and authorizing him to make a loan to pay Mr. and Mrs. Taylor the cost of the improvements made on the lots, not to exceed $53,700. Mr. Mulliken accepted the trust, and on the 23d of August made four trust deeds, covering sub-lots 1, 2, 4, and 5 of said subdivision, to Francis S. Howe, trustee, to secure the payment of four notes of $9,000 each,

given by Mulliken and Mr. and Mrs. Taylor to the Franklin Savings Bank; and on the 1st of January, 1874, Mulliken, the trustee, and Mr. and Mrs. Taylor, joined in the execution of another trust deed to Francis S. Howe, to secure the individual note of Taylor to the Franklin Savings Bank for $2,875.

"The proceeds of the four first-mentioned trust deeds were used to take up the $30,000 loan made by Taylor from the bank in June, 1872, and the last-mentioned trust deed for $2,875 was to secure a personal indebtedness of Taylor's to the bank, not growing, as the proof shows, out of the rebuilding.

"In September, 1873, a petition for a mechanic's lien was filed by Henry Gilsdorff for labor and materials used in the construction of the block of new buildings, in which petition other contractors intervened. This case came to hearing in July, 1874, and resulted in a decree establishing liens on the premises in favor of Gilsdorff and those who had intervened with him, which decree was afterwards affirmed by the Supreme court of this state at the September term, 1874. (74 Ill., 354.)

"In June, 1876, the Franklin Savings Bank filed in this court a bill to foreclose the four trust deeds of August 23, 1873, which, after default of some of the adult defendants, and answers by the guardian *ad litem* of the infant defendants, was in May, 1877, referred to a master to take proofs and report. In June, 1877, the original deed of trust to Scott was found, and very soon thereafter bills of review were filed in the case under the burnt records act, and in the suit brought for the appointment of a new trustee in the place of Scott, and in which the decree appointed Mulliken trustee, and authorized him to make the loan to pay for building the five houses, which bills of review resulted in decrees setting aside the former decrees in those cases; but the decree in the case under which Mulliken was appointed trustee contained a clause that nothing therein ordered or contained should deprive the Franklin Savings Bank, or Howe, the trustee in the said trust deeds, of any interest they, or either of them, might have in the trust estate, the claims of the bank and said Howe not having been heard or adjudicated.

"After the original trust deed was found, the bank filed a supplemental bill in the foreclosure case, which was answered. Before a report was made by the master terms of settlement or compromise were made between the bank and the guardian *ad litem* of the infant defendants then in court, which included all the children then born, and all the children of the parents, except Margaret, the youngest. By this compromise the children were to have one of the sublots and the house thereon, free and clear of all incumbrance. On the 29th of April, 1880, a decree of foreclosure was entered in the foreclosure suits in pursuance of the terms of this

agreement, which by its terms was a foreclosure of the four trust deeds on sublots 1, 2, 4 and 5, respectively, and of the trust deed securing the $2,875 (Taylor's individual debt) on the whole four lots, and a sale was directed to be made by one of the masters of the court of the sublots 1, 2, 4 and 5 to pay the amount found due by said decrees on the respective trust deeds; the lien of the several trust deeds on the premises covered by them, respectively, being found by the decree to be subject to the prior mechanic's lien established by the decree in the Gilsdorff case.

"A sale was made under this decree on the 16th of June, 1880, and each house and lot sold to the bank, and certificates of purchase given by the master to the bank as such purchaser; and afterwards, to consummate the settlement made with the guardian *ad litem* of the infant children, the certificate of purchase for lot 2 at such master's sale was assigned to the guardian *ad litem*, and by him assigned to the six children then born, and a deed was in due time made to them by the master, and a deed was also made to the bank of lots 1, 4 and 5.

"After the affirmance by the Supreme court of the decree in the mechanic's lien case, the bank purchased the decree in that case, and was the owner of such decree at the time of the entry of the decree in the foreclosure case, and at the time of the alleged compromise and settlement; and on the 15th of July, 1881, a sale was made under the mechanic's lien decrees, and the defendant, H. H. Thomas, who was then the president of the bank, became the purchaser of the three sublots 1, 4 and 5; and it is admitted that this purchase was made by Mr. Thomas for the bank, and that he now holds the title solely for the bank, and has no individual interest therein.

"It also appears that the three oldest children were made defendants to the bill for the restoration of the deed of trust under the burnt records act, and appeared and answered by guardian *ad litem;* that the four oldest children were made parties to, and appeared and answered by guardian *ad litem* in the bill for the appointment of a new trustee, and that under the mechanic's lien suit the four oldest children were made parties defendant, and appeared and answered by guardian *ad litem*. But the Supreme court, in the suits brought by Julia S. Taylor against the bank to set aside the decree in the mechanic's lien suit, as far as it affected lot 3 in said subdivision, found that there was no service upon the infant defendants in the mechanic's lien case. It also appears that the youngest child, Margaret, who is one of the original complainants in this case, was born after the entry of the decree in the foreclosure case. It also appears that all the seven children, born of the marriage of Mr. and Mrs. Taylor, who are

parties to the original and cross-bills in this case, were minors at the time the original and cross-bills were filed."

In the Gilsdorff case there is in the record no proof of service of process upon the infant defendants, except the recital in the final decree of a finding that 'due service of process was had upon all the defendants except the Franklin Savings Bank.'

On the 20th of July, 1880, following the master's sale under the foreclosure decree, Mulliken, as trustee, and Frank C. and Maria L. Taylor, joined in the execution of a quitclaim deed of lots 1, 2, 4 and 5 to Thomas, as president, for the use of the savings bank. No reference is made to that deed in either the bill or cross-bill.

The supplemental bill filed by the savings bank in the foreclosure case gave a true and full account of antecedent facts affecting the rights of the parties, including the discovery and contents of the deed of trust.

The terms in which the trust was defined, in so far as they are relevant here, are as follows:

"*Firstly*, for the use and benefit of the said Maria Louise Taylor, and the children of the said Frank C. and Maria Louise Taylor, to be used and occupied by them as a homestead or place of residence, subject, however, to the trusts and uses hereinafter contained; it being, however, expressly provided and understood that the improvements now standing on said premises may be added to, altered, or removed, and new buildings erected thereon; provided, always, there shall be no lien, incumbrance or charge created thereby on said premises; and it is further provided that the whole or a portion of said premises may be used for the purpose of deriving a revenue therefrom, as is hereinafter provided, and that a portion only of said premises may be used as such homestead as aforesaid. * * *

"*Secondly*, and upon this further trust, namely: The said Ira Scott, or his successors in trust, shall bargain, sell and convey a portion of said premises for the purpose of procuring funds to build upon and improve the remainder thereof during the joint lives of the said Frank C. and Maria Louise Taylor, upon their joint written request, and such request shall be signified by their joining with such trustee in the execution of the deed or deeds of conveyance. * * *

"*Provided*, always, that no charge or incumbrance on said premises, or any portion thereof, shall be thereby created by said Ira Scott or his successors in trust."

Thirdly, to the effect that, after the payment of costs, taxes and assessments, the income shall be paid to Mrs. Taylor, for her sole use and benefit, during the life of her husband, and that after his death there should be paid to her out of the income the sum of $3,000 annually, and the remainder, if any, to the children.

The Burnt Records Act of this state contains these provisions:

"Said decree of said court, when entered on either of the petitions above mentioned," [*i. e.*, a petition to establish title and petition to establish lien], "shall be forever binding and conclusive, unless an appeal be taken during the term of the court at which the decree shall be rendered, or a writ of error shall be sued out within twelve months from the entry of said decree, in which case the final decree entered in said cause shall be binding and conclusive, as aforesaid, from the entry thereof, except against minors and insane persons. * * * And provided, further, that married women, insane persons and minors shall have two years after their disabilities are removed to prosecute a writ of error from said decree. * * * And provided, further, that in all decrees against infants, persons of unsound mind, or married women claiming property in their own right, other than right of dower, the decree shall set forth the evidence upon which it is based."

The scope of the suit in which the decree of August 19, 1873, was rendered is sufficiently indicated by the court's finding, which followed closely the averments of the bill, and which, with abbreviations not affecting the sense, was as follows:

That in and by said deed the premises were conveyed to Ira Scott and his successors in trust, to be held and managed by him and them in trust for the benefit of Frank C. Taylor, Maria Louise Taylor, their children, and the devisees and legatees of the said Frank C. Taylor; that by the terms and provisions of the trust conveyance, among other things, the said Scott and his successors in trust were authorized and empowered to build upon and improve the premises, or any part of the same, for the purpose of deriving a revenue therefrom, and to borrow money for the purpose of making the improvements, and to secure the payment of the same by executing on the premises, or any portion thereof, mortgages or trust deeds, and also to sell a portion of the premises for the purpose of raising funds to improve the trust estate; that from the

date of the trust conveyance, during and until the great fire of October 8th and 9th, the said Maria L. Taylor occupied the premises as a homestead, under the trust conveyance, in accordance with the terms thereof; that during that time the entire improvements of the premises consisted of the residence and outbuildings attached thereto; that by the fire all of the improvements on the premises were destroyed, and the said Frank C. and Maria L. Taylor, with their children, were thereby left without a home, and were also in other ways losers to such an extent that they could not suitably provide for their necessary wants and those of their children and pay the taxes and assessments laid and assessed on the premises, without in some way making the trust estate available as a source of revenue; that the premises were situated in a portion of the city of Chicago that had been and continued to be valuable for residence purposes, and that good, careful and judicious management of the trust estate, for the best interests of all concerned therein, required the erection thereon of a block of five first-class residences; that owing to the destruction of the trust conveyance and the public records, it was impossible for the trustee either to sell and convey the premises, or any portion thereof, or to borrow money upon the same as security, until the terms of the trust should be declared by the decree of some court having competent jurisdiction in such matters, which at that time could not have been had without great delay, and that such delay would have operated greatly to the prejudice and damage of the trust estate; that to protect and preserve the estate, and acting for the best interests of all concerned, the said Frank C., as agent of Maria L. Taylor, and at her request, borrowed a large sum of money, and with the same erected on the premises a block of five marble-front residences, one of which is now occupied by said Maria L. Taylor and her family as a homestead under the trust deed; that the improvements on the premises were commenced in the month of August, 1872, and completed in the spring of 1873, and were wise and judicious; that Maria L. Taylor, through her husband as her agent, had expended in said improvements and the erection and completion of said block of residences the sum of $53,700; that the money was judiciously and wisely expended, and that the fair value of the improvements is the sum of $53,700; that it is advisable and necessary, for the best interests of the trust estate, to sell and convey one or more of the houses so erected on the premises, and to borrow enough money otherwise upon the trust estate to pay for the improvements the said sum of $53,700. It was decreed that the said Charles H. Mulliken, who was therein appointed successor in trust, be 'authorized and empowered, out of any funds arising from the sale of said premises, or any part thereof, or from any loan made for that purpose, to pay and discharge to the said Frank C. Taylor and Maria L. Taylor all

the costs of said imorovements as aforesaid advanced and paid by them or either of them, not to exceed in amount the sum of $53,700.'

Besides the mortgages to the Savings Bank, Frank C. and Maria L. Taylor, and Mulliken, as trustee, on the 10th of November, 1873, joined in a conveyance of sublot 3 to Julia S. Taylor, wife of a brother of Frank C. Taylor, for $15,000; and in the case of *Franklin Savings Bank* v. *Taylor*, 131 Ill., 376, the state Supreme court upheld the sale, and declared that the purchaser was not bound to look after the application of the purchase money.

This suit was commenced December 1, 1884, in the Superior court of Cook county. The bill then exhibited was confined to an attack upon the title of the appellant, the Franklin Savings Bank, to lots 1, 4 and 5 of the property in controversy, as derived through the sale made under the mechanic's lien decree in favor of Gilsdorff and others. The suit was removed upon the petition of the appellant to the Circuit court of the United States for the Northern District of Illinois, where no steps were taken in it until the 18th of March, 1887, when the scope of the action was enlarged, and the relation of the parties changed, by the filing of an amended bill in which Robert C., Katharine, and Margaret Taylor became complainants, and the other children, Frank C., Maria L., Josephine S., and Alexander, who had been plaintiffs in the original bill, were made defendants. They at once filed a cross-bill, adopting the averments of the amended bill, and praying substantially the same relief.

The amended bill reviewed the various steps taken in relation to the trust estate from the creation of the trust in June, 1872, to the filing of the original bill, December 1, 1884, and in substance asked, and by the decree it was granted:

First. That the decree of foreclosure in the Federal court, and the master's sale and conveyances made under it, be declared void as to the interests of the complainants in the premises.

Second. That the two decrees of the Superior court of Cook county, entered upon bills brought for the review of its previous

decrees, be declared absolute in respect to the claims of the Savings Bank.

Third. That the Gilsdorff decree in the Circuit court of Cook county be declared fraudulent and void, and likewise the deed of the master in chancery made in execution of that decree.

Fourth. That a new trustee be appointed as successor to Scott in the original deed of trust.

Fifth. That the Franklin Savings Bank, be required to account for and pay over to the new trustee the proceeds of the rents and profits of the trust property while it was in the bank's possession.

In respect to the Gilsdorff decree the ground of review or attack is stated to be that it "was procured by misrepresentation and imposition upon said Circuit court, in this, that the said court was misled and imposed upon by the production, as evidence, of said pretended deed of trust as confirmed by the Superior court." There is in the amended bill no charge of suppression or fraudulent concealment of the trust deed. The averments touching the point are: "That the original deed had been lost or mislaid, and could not be found;" "that it was not true, as alleged in said bill,"—on which the burnt records decree was obtained—"that said deed of trust had been destroyed by fire; but it was true, as your orators believe, that at the time said suit was pending in the Superior court, the said deed was lost or secreted, and could not be found"; "that some time after the entry of said decrees in the Superior court the said deed of trust * * * was found"; and that in the proceedings for the review of those decrees the court found "that it was newly-discovered evidence, not possible for the complainants in review to have produced at the hearing of said original bills of complaint," and thereupon ordered that the original decrees be set aside and annulled, but with a proviso to the effect that the rights of the Savings Bank had not been considered, and were not determined.

In respect to the decree of foreclosure in the Circuit court of the United States, the allegations are to the effect that the guardian *ad litem* acted without authority in entering into an agreement

with the Savings Bank for a compromise and settlement of the suit; that the settlement was a fraud upon the rights of the complainants and upon the court, for which the foreclosure decree and sale ought to be set aside and declared void as to the complainants; and, "farther, that the decree is erroneous, and should be reversed and set aside for many apparent errors and imperfections, insomuch as it appears by the supplemental bill that said Mulliken, as successor in trust to the said Ira Scott, had no power or authority to incumber the trust estate, nor to create a lien or charge upon the land."

The respective positions of the parties, and the views which prevailed, are shown in the following extracts from the opinion below:

"The contention on the part of the complainants is that the our trust deeds given by Mulliken, trustee, with the consent of Mr. and Mrs. Taylor, on the four houses and lots, and also the decree in the mechanic's lien case, are all void and inoperative as against the complainants and cross-complainants, under the clause in the deed of trust to Scott, which prohibited the creation of any lien, incumbrance, or charge on the trust premises; that they are not bound by the decree in the foreclosure case, because the decree was by consent, and they were not competent to give such consent: and that the decree in the mechanic's lien case did not bind the infant defendants therein, because there was no service of process on them, and also because such decree was obtained by imposing upon the court the false deed established by the decree in the Burnt Records Act of all which, and of the true terms of the genuine trust deed, it is claimed the petitioners in the mechanic's lien case, and the bank and its president, Mr. Thomas, were bound to take notice. * * *

"It is insisted on the part of the defendants that the decrees in the Burnt Records Act case, and in the case appointing a new trustee, fully empowered the making of the five trust deeds involved in the foreclosure suit; that four of the children were parties to those suits, and bound by the terms thereof, and the other unborn children were bound by representation; and that those decrees remained in full force at the time such trust deeds were made.

"It may be, and probably is true, that so long as those decrees, as well as the decree in the mechanic's lien case, are allowed to stand, they are binding by their terms upon the infant defendants as well as upon the adult parties; but the essential question is, can

these infants attack those decrees, and have them set aside as against parties who acted under them while they were in force? I consider the law to be well settled that the infants can, by an original bill in the nature of a bill of review, attack any decree entered against them during their infancy, and have it set aside for fraud, or error of fact. Daniell, Ch. Pr., 169, 170; *Rogers* v. *Smith*, 4 Pa. St., 93; *Mills* v. *Dennis*, 3 Johns. Ch., 367; *Massie* v. *Donaldson*, 8 Ohio, 377; *Mathes* v. *Dobschuetz*, 72 Ill., 438; *Gooch* v. *Green*, 102 Ill., 509; *Lloyd* v. *Kirkwood*, 112 Ill., 337; *Kuchenbeiser* v. *Beckert*, 41 Ill., 172; *Kingsbury* v. *Buckner*, 134 U. S., 650, 10 Sup. Ct. Rep., 638. It is also well established, I think, by the authorities, that any consenting decree entered against a minor is not binding, and can be attacked by original bill for the purpose of setting it aside; and in support of this practice no other authority need be cited than that of *Kingsbury* v. *Buckner*, above cited. Assuming, as I do, the right of these minors to attack this bill of foreclosure by their bill, I think the court must now assume that, had all the facts touching the validity of the securities involved in that suit been presented to the court, the court must have held that the securities sought to be foreclosed and enforced in that proceeding were invalid, and have dismissed that suit for want of equity as against the infant defendants; and as the court was prevented from doing so, and was led into making an inequitable decree by the unauthorized agreement of the guardian *ad litem*, it will in this suit, now brought by the minors themselves, enter such decree as should have been entered in the original foreclosure case. As to the Gilsdorff decree, and the sale under it, I can see no reason why it is not properly the subject of attack by this bill. Undoubtedly, at the time that decree was rendered, the court properly assumed that it was justified by the deed of trust, as restored by the decree of March 29, 1873, under the Burnt Records Act; but that decree was based upon a most palpable error of fact, of which the bank and its president were charged with notice, and it seems to me the right of these infants to set aside that decree, and all that has been done under it, is palpable. To set aside these sales under the foreclosure and mechanic's lien decrees will, without doubt, work a hardship upon the bank, that has invested a large sum of money on the faith that the four $9,000 mortgages were valid; but the court cannot escape the conclusion that there was ample constructive notice that the trustee had no power to make those mortgages, as well as that no valid mechanic's lien could be created on the trust estate, and to hold that these incumbrances are valid as against these children would make a precedent for defeating the rights of many more minor children."

WOODS, J., after making the foregoing statement: The rule that a decree against infants may be attacked by original bill for error of fact or mere mistake, as well as for fraud, is subject to an important qualification. Thus, in *Lloyd* v. *Kirkwood*, 112 Ill., 338, the court, after stating the general proposition, said:

> "The rule thus established is, of course, subject to the qualification that the decree of a court having jurisdiction of the subject-matter of the suit, and the person of the infant against whom it is rendered, will not be thus set aside as against third parties who have in good faith acquired rights under it; but as against original parties to the suit, and their legal representatives, the rule as above stated will be enforced."

The essential question before us, therefore, is whether or not the Savings Bank, under any of the decrees mentioned, had acquired rights which ought to be protected, notwithstanding the discovery of the error upon which the decree was founded.

There are two reasons why that protection cannot be claimed directly under the decree in the Burnt Records case. *First*, the bank was a party to that procedure; and, *second*, by the terms of the statute under which the decree was taken, it was made "binding and conclusive, except as against infants and insane persons;" implying necessarily, it would seem, that as against minors the decree had the effect only of *prima facie* evidence, although, so long as the original deed remained undiscovered it was likely to be regarded and acted upon as conclusive.

The second decree, rendered August 19, 1873, is of more significance in the discussion. By it a new trustee was appointed, and in effect, though not in direct terms, authorized to obtain money either by selling or mortgaging the trust estate for the purpose of paying for the improvements which had been put upon the premises; and under that authority the loans were made, and the trust deeds or mortgages executed, which were the principal source of the appellant's claim of title. Though obtained by use of the first decree, as evidence of the provisions of the trust deed, and on that account subject to be reviewed and set aside, the decree was on its face regular and valid, and as the decision of a court of gen-

eral jurisdiction it was, until set aside, binding upon all the parties to the same extent as any other decree or judgment, and was available for the protection of any who had acted upon it.

It was not, as has been contended, a supplemental decree, obtained in aid of that under the Burnt Records Act, and therefore, like that, neither conclusive upon minors nor a source of protection to the bank. The purpose of the first procedure was fully accomplished in the reinstatement, as of record, of the provisions of the trust deed, and no supplement was needed. Besides, the second decree was procured upon an independent bill, which, while it recited the fact of the rendition and the scope of the former decree, contained original and direct averments of the execution and provisions of the lost deed; so that, if the reference to the former decree had been omitted, neither the character nor sufficiency of the bill would have been affected.

While it is true that this decree was founded on an error of fact in respect to the powers of the trustee, it was not a palpable error, nor one of which the bank and its president were charged with notice. So long as the trust deed remained undiscovered, not only was the error not evident; there was nothing to suggest its probable existence. In substantial compliance with the requirement of the Burnt Records Act that a decree under it against minors should set forth the evidence on which it was based, the master's report, upon which the decree of March 29, 1873, was rendered, contained the full and explicit testimony of Frank C. Taylor and other witnesses to the effect that the copy embodied in the decree was a true copy of the trust deed, and under the circumstances there was neither reason for suspecting nor means of finding out the contrary. And yet it is insisted, and it is the pivot of the argument for the appellees, that the Savings Bank all the while had constructive notice, and should be treated as if it had known that under the recorded and true deed of trust the trustee had no power to execute mortgages or to create liens. It would not be so held in a court of law, even. It is of course true that that constructive notice which results from the recording of a deed continues in force though the record be destroyed. That is a rule which has its proper and necessary place

in public policy, but it is not of universal or inflexible application. The record of a deed, when produced intact, is not final or conclusive proof of the contents or tenor of the original instrument. It may be contradicted by the production of the deed or by other evidence; and it follows necessarily that the force of a record, as constructive notice, cannot prevail over that presumption of absolute verity which inheres in the judgment or decree of a competent court. Whether the record has been destroyed or remains unharmed, a lawful decree, declaring the terms or tenor of an instrument to be different from the record of it, supersedes or overcomes the latter as evidence; and upon the same principle the decree of August 19, 1873, superseded the destroyed record of the trust deed, or, as it may be better to express it, the decree became conclusive evidence of what that record had shown. It was in recognition of this fact that it was deemed necessary, after the missing deed had been found and re-recorded, to bring bills of review, in behalf of the infant parties, to obtain orders of the Superior court setting its decrees aside; and accordingly they were set aside, except that the rights of the Savings Bank were not determined. Whether or not the same parties should be allowed, even by original bill, to make a second attack upon those decrees for the same cause, has not been mooted, and we do not stop to inquire.

But, proceeding on the assumption that the second decree was one which should not be set aside to the injury of third persons, it is insisted that to the extent of the $30,000 first loaned to Taylor, which, with accrued interest, became *pro tanto* the consideration of the notes and mortgages which were foreclosed, the Savings Bank parted with no value upon the faith of that decree, and therefore can claim no protection under it. The position is not tenable. The note given by Taylor for the first loan and the trust deed executed by him and Mrs. Taylor to secure the debt were surrendered and released. It is not claimed that these were without value. Taylor still had credit, and Mrs. Taylor, by reason of her right to receive the income of the trust estate, had an equitable interest, which doubtless was subject to the mortgage. *Blanchard* v.

Blanchard, 1 Allen, 225; *Van Rensselaer* v. *Read*, 26 N. Y., 558; *Monarque* v. *Monarque*, 80 N. Y., 320. Besides, the debt was due, and upon the new loan an extended credit was given. Upon these facts the bank, being without knowledge of the actual powers of the trustee, was entitled to rely, and it is to be presumed did rely, on the authority declared by the decree under which the trustee assumed to act. This conclusion, however, does not rest upon the doctrine of *Swift* v. *Tyson*, 16 Pet., 1, *Railroad Co.* v. *National Bank*, 102 U. S., 14, and like cases, concerning the transfer of negotiable paper in payment or for the security of a pre-existing debt. That doctrine is peculiar to negotiable paper, and does not apply to transfers for like purposes of ordinary chattels or interests in real estate. It is so held in the case of *People's Savings Bank* v. *Bates*, 120 U. S., 556, where the rule declared by Judge Story in *Morse* v. *Godfrey*, 3 Story, 389, is quoted with approval. According to that it is not enough that there shall be given "a simple collateral "security for an old indebtment or liability of the parties;" the one claiming to be an innocent purchaser or mortgagee of personal or real property "must not only have had no notice, but he must "have paid a consideration at the time of the transfer, either in "money or other property, or by a surrender of existing debts or "securities held for the debts and liabilities." "There must be "some new consideration moving between the parties, and not "merely a new security given for the old debts or liabilities, with-"out any surrender or extinguishment of the old debts and liabili-"ties or the old securities therefor." That one who merely receives a mortgage of land for a pre-existing debt does not become a purchaser for value was held or recognized in *Busenbarke* v. *Ramey*, 53 Ind., 499, and *Straughan* v. *Fairchild*, 80 Ind., 598; but in *Gilchrist* v. *Gough*, 63 Ind., 584, it was held to be sufficient for that purpose, that in consideration of the new security, the time for the payment of the debt had been extended. In Illinois the payment, or security, or extension of the time of payment, of a pre-existing debt has been declared sufficient. (*Butters* v. *Haughwout*, 42 Ill., 18; *McIntire* v. *Yates*, 104 Ill., 491, 501; *Bank* v. *Cheeney*, 87 Ill., 602.) And in *Glidden* v. *Hunt*, 24 Pick., 221, it was de-

cided that when a creditor made a further loan to his debtor, and took a mortgage to secure both loan and debt, he became a mortgagee for value to the full amount of both, because the presumption was that he had parted with his money in order to obtain protection for the antecedent advances, as well as for those made at the time. We need not go so far. In the present case all the elements of good faith mentioned in the cases cited were combined. The old obligation and security were surrendered and released; the time of payment was extended; an additional sum was loaned; and, in fact, there was a change of debtor, the trustee becoming the principal in the new obligations, and Taylor and wife sureties only.

It follows that, regardless of the compromise agreement, the Savings Bank was entitled to the decree of foreclosure, which it obtained, for the full amount of its demands, and that upon all the facts alleged in the bill no valid reason is shown for setting the decree aside, or for annulling the mortgages on which it was based. Error is not apparent on the face of the record; and, in view of our conclusion that the mortgages were valid as against all who were bound by the decree of August 19, 1873, the objection that the guardian *ad litem* in the foreclosure case had given unwarranted consent to a compromise loses significance, if, indeed, it does not bring support to the decree, because by the compromise there was saved to the children one-fourth of the property, and a corresponding portion of accrued rents, which otherwise in all probability would have been forfeited to the bank. It is to be observed, too, that upon its face it was not a consent decree. The guardian *ad litem*, though he had withdrawn a special answer, had filed another in the customary form. No fact was admitted; no proof waived; and every essential fact shown in the special answer, which was withdrawn, and all the facts on which the claims of the infants are now asserted, were distinctly set forth in the appellant's supplemental bill, upon which the decree was granted. It is not alleged, nor has it been suggested, that any fraud or deceit was practiced, to keep from the court a knowledge of the facts so averred. Consequently, at the hearing below, it was

not only not to be presumed, it would not have been competent to prove, that in the foreclosure case the court proceeded to a decree without knowing the contents of the bill; or that had the facts touching the validity of the securities sought to be foreclosed and enforced been presented to it, the court would have held the securities invalid, and dismissed the suit. Besides, it is in proof that after the Savings Bank, in compliance with the compromise, had assigned its certificate of purchase, at the foreclosure sale, of one of the lots to the guardian *ad litem*, the latter in a petition for instruction, to which he made his wards defendants, reported the settlement and the relevant facts to the Circuit court of Cook county, and that court, after a hearing at which the infants were represented by a guardian *ad litem* appointed for the purpose, ordered a transfer of the certificate and of the property to the children *in esse*, with a provision that after-born children should be admitted to share with those named; and, the certificate having been transferred as ordered, the master in the foreclosure case reported to the court for approval a deed for the conveyance of the lot described directly to the Taylor children, by name, and that deed the court approved. It is evident, therefore, that the compromise agreement received the deliberate approval of the local Circuit court, which as a court of chancery had cognizance of the affairs of minors; and, by necessary implication from the last order made in the case, it had the approval of the court in which the decree of foreclosure was obtained. If that decree had been taken upon default of the infant defendants, or if upon its face it appeared to have been taken in pursuance of a compromise which was not shown to have had the explicit approval of the court, it may be that it would have been subject to review without inquiry into the merits of the compromise; but when, without impugning the fairness of the proceedings in court, it is proposed to set aside a decree which upon its face is in all respects regular, because of an alleged agreement or consent of the guardian *ad litem* which is not referred to in the record, we are strongly inclined to think it should be alleged and proved, not only that the agreement had been made, but that it was not beneficial to the infants concerned,

or for some other reason ought not to have been made. See *Walsh* v. *Walsh*, 116 Mass., 377. The maxim that equity regards substance rather than form would seem to be applicable to such cases.

Concerning the Gilsdorff decree a single question is presented. When the contracts were made, and the work done and materials furnished, which were the foundation of the liens thereby declared, the decree in the Burnt Records case not having been entered, the parties were chargeable with constructive notice, and when the Savings Bank took an assignment of the decree it had actual knowledge of the provisions of the trust deed. There is, therefore, no reason why that decree is not reviewable in this action for the error of fact upon which it was founded, unless it be because it had been affirmed by the Supreme court of the state, without the right being reserved or leave obtained of that court to bring the suit. Upon that question, in *Southard* v. *Russell*, 16 How., 547, 570, it is said:

> "The better opinion is that a bill of review will not lie at all for errors of law alleged on the face of the decree after the judgment of the Appellate court. * * * Nor will a bill of review lie in the case of newly-discovered evidence after the publication, or decree below, where a decision has taken place on appeal, unless the right is reserved in the decree of the Appellate court, or permission be given on an application to that court directly for the purpose. This appears to be the practice of the Court of Chancery and House of Lords in England, and we think it founded in principles essential to the proper administration of the law, and to a reasonable termination of litigation between parties in chancery suits."

It is insisted that this is a dictum, and ought not prevail against the weight of authority and reason to the contrary. But it is quoted with approval in *Kingsbury* v. *Buckner*, 134 U. S., 650, 671, and we are not disposed to disregard it. We consider it applicable, too, to a decree which has been affirmed, as well as to one entered upon the order of the Appellate court. In *Durant* v. *Essex Co.*, 101 U. S., 555, it is said:

> "On a mandate from this court affirming a decree, the Circuit court can only record our order, and proceed with the execution of its own decree as affirmed. It has no power to rescind or modify what we have established."

And the fact that the relief is sought by an original bill instead of bill of review proper should, we think, make no difference. The ground of relief is the same whether it be sought in one way or the other. Even when there has been no appeal, the rule is that the granting of a bill of review for newly-discovered evidence is not a matter of right, but it rests in the sound discretion of the court. "It may, therefore, be refused, although the facts, if ad-"mitted, would change the decree, where the court, looking to all "the circumstances, shall deem it productive of mischief to inno-"cent parties, or for any other cause unadvisable." Story, Eq. Pl. § 417. Accordingly, in some jurisdictions, though not in all, special leave of court must be obtained for bringing the bill.

Concerning the objection that the Gilsdorff decree was entered without service of process on the infant defendants, it may be remarked that, if the decree could be attacked on that ground in any court except that in which it was rendered, it has not been attempted in the bill before us, which alleges nothing on the point. The court in which the decree was obtained being one of general powers, the presumptions are in favor of its jurisdiction in any matter of which it has taken cognizance; and, besides, this decree, as it is presented in the record before us, shows a finding that process had been duly served. It is true that in the reporter's statement of facts preceding the opinion in *Franklin Savings Bank* v. *Taylor*, 131 Ill., 376, it is said that "no summons was ever served upon either of the defendants;" but that statement is not evidence here, and would not be if it had been made by the court instead of the reporter. It is, moreover, inconsistent with the opinion and judgment of the court, in which, while it is held that the decree was not binding upon the appellee Julia S. Taylor, because she was not a party, it is said that it was "of "course * * * *res judicata* as to the parties then before "the court;" and when the case was directly before that court on appeal—*Taylor* v. *Gilsdorf*, 74 Ill., 354—the chief dispute was whether "the interest in remainder in the estate held by the trustee for the heirs of Taylor" could "be subjected to a mechanic's lien." But, if none of the children had been served with process.

the question was not presented, and, it is not to be presumed, that the court would have considered it, or would have affirmed the decree; since, if process had not been served, the decree was, in respect to the minor defendants, void upon its face. It follows that the title of the Savings Bank, acquired through the sale under the mechanic's lien decree, should not, upon the facts averred in the bill, have been disturbed.

The question remains whether or not the children born after the rendition of any of these decrees are bound thereby. If so, it is because they are to be considered as having been represented in the suits by those who were parties. Upon that subject we quote from the opinion in *McArthur* v. *Scott*, 113 U. S., 340, where the authorities are reviewed:

> "The general rule in equity, in accordance with the fundamental principles of justice, is that all persons interested in the object of a suit, and whose rights will be directly affected by the decree, must be made parties to the suit. Exceptions to this have been admitted, from considerations of necessity or of paramount convenience, when some of the persons interested are out of the jurisdiction, or not in being, or when the persons interested are too numerous to be all brought in; but in every case there must be such parties before the court as to insure a fair trial of the issue in behalf of all."
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> "The cases in courts of general chancery jurisdiction, cited in behalf of the defendants, * * * naturally range themselves in several classes.
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> "Some of them were of mere changes of investment, leaving undiminished the interests of all parties in the property in its new form. * * * To the same class belong suits for partition, which are either for a division in severalty of lands before held in common, or else for a sale of the whole land, and a division or investment of the proceeds for the benefit of those who, but for the sale, would have had interests in the land. * * *
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> "Another class of cases is that of creditors, who are entitled to present payment of their debts, whoever may be the future owner of the estate. For instance, in a bill to enforce a debt charged upon real estate devised to one for life, with contingent remainder to his unborn son, the executor and the tenant for life are sufficient parties, because, as was said long ago by Lord Hardwicke, if there is no one in whom the estate of inheritance is vested,

'it is impossible to say the creditors are to remain unpaid, and the trust not to be executed, until a son is born. If there is no first son in being, the court must take the facts as they stand.' * * *

"In some other cases, when all the interests are legal, and not equitable, the owner of the first estate of freehold, representing the whole estate, and identified in interest with all who come after him, sufficiently represents those yet unborn. In case of an estate tail, for instance, Lord Redesdale held it to be sufficient, in order to bind contingent remaindermen, to bring before the court the first tenant in tail, (although an infant, incapable at law of barring remaindermen), and, if no tenant in tail in being, the first person entitled to the inheritance, and, if no such person, then the tenant for life. But the reason assigned by that great master of equity was 'that where all the parties are brought before the court that can be brought before it, and the court acts on the property according to the rights that appear, without fraud, its decision must of necessity be final and conclusive.' *Giffard* v. *Hort*, 1 Schoales & L., 386, 408; Calvert on Parties, 55–60. The necessity of the case being the only reason for this, it follows that where the successive estates are equitable, and supported by a legal estate devised in trust, the trustees also are necessary parties. *Hopkins* v. *Hopkins*, West Ch., 606, 619; S. C. 1 Atk., 581, 590; *Cholmondeley* v. *Clinton*, 2 Jacob & Walker, 1,133; *Mullins* v. *Townsend*, 5 Bligh, N. R., 567, 591; S. C., 2 Dow & C., 430, 438; *Ex parte Dering*, 12 Sim., 400; Calvert on Parties, 253, 327."

By the deed of June 13, 1871, the entire legal estate was vested in the trustee, and the present beneficial interest in Mrs. Taylor the rights of other beneficiaries being all remote and contingent. It is to be observed, too, and in this the case may be distinguished from *Breit* v. *Yeaton*, 101 Ill., 252, the trustee, with the consent of Mrs. Taylor and husband, had power "to sell and to give dis-" charges for the purchase money and for the rents and profits of " the estate." *Franklin Savings Bank* v. *Taylor*, *supra*. So that if this trust had been created by devise, instead of deed, it would be literally, as it is essentially, within the forty-ninth Equity rule of the Supreme court, by which in such cases the trustee represents the beneficiaries who need not be made parties, unless at the hearing the court shall require it.

In *Breit* v. *Yeaton*, *supra*, cited in behalf of the appellees,

a marriage settlement had been made whereby the property of the future wife was conveyed to trustees for the benefit of the husband and wife during their joint lives, and for the benefit of their children after the death of the wife. After the birth of one child the husband and wife brought a bill making the trustees, only, parties defendant, seeking to incorporate into the marriage settlement certain powers of sale which it did not contain in its original form. The original property (certain stocks or bonds) was subsequently sold under the power thus introduced, and the proceeds invested in lands belonging to the husband, and of which the husband subsequently repossessed himself by conveyance from the trustees. The suit was to compel a conveyance to the heirs at law, including after-born children, and for partition. Treating the question of parties as if the interests involved were all legal, the court said:

> "Counsel for the plaintiffs in error seem to concede that J. Southgate (the child *in esse*) should have been made a party, but contend that it was competent to render a decree in that proceeding, binding upon those not in being, and they cite Story, Eq. Pl., §§ 145, 792, where it is said: 'As it is sufficient to bring the first tenant in tail before the court, if in being, whether he be plaintiff or defendant in the suit, so, if there be no such tenant in tail in being, the first person in being entitled to the inheritance should be made a party, and, if there be no such person in being, then the tenant for life; and in such cases the decree made will bind the other persons not in being.' This is upon the principle that where the interest of one person is involved in that of another, and that other possesses the legal right, so that the interest may be asserted in his name, it is not necessary to bring both before the court. MARSHALL, Ch. J., in *Hopkirk* v. *Page*, 2 Brock., 42. Manifestly, then, the rule can have no application here. There is here no prior estate of inheritance, and the interests of the heirs at law are not involved in that of another, but on the contrary, are adverse to all other interests to be derived under and by virtue of the power. The decisions hold that the heirs at law, in cases like the present, are purchasers, and no decree will affect their rights to which they have not been made parties."

The quotation from Story, manifestly, is applicable only when the interests are legal and not equitable; and of the cases cited

in support of the last proposition one only is explicit upon the point. In *Parker* v. *White*, 11 Ves., 219, it is said, concerning a marriage settlement which provided contingent remainders for children, that the parents took as purchasers for the children; but in none of them is anything said upon the subject of parties by representation. In *Graham* v. *Houghtalin*, 1 Vroom, 552, there is a dictum to the effect that the rights of the unborn were not, and could not have been, affected by the decree there in question; but the point ruled was that the decree was void, even as against children *in esse* who were parties, because the court was without jurisdiction of the subject-matter. Conceding that the beneficiaries of contingent interests take as purchasers, and that they should be made parties to any procedure designed to affect their rights, it does not follow that unborn beneficiaries may not be parties by representation.

While it is true that the interests of those who are to share an estate or fund are in a sense adverse, inasmuch as every addition to the number of participants diminishes the share of each, yet when the litigation is not between the members of a class, but between the class as a whole, and other parties claiming adverse rights, it is evident that a defense made by or in behalf of one of the class must inure to the benefit of all the members alike; and in such cases, where the rights of unborn persons are involved, it is not unreasonable that they should be deemed to be represented by the living parties who are identified with them in interest. But when, as in this case, the successive interests are all equitable, and supported by a legal estate devised or granted to a trustee, the latter is an indispensable party, and, when before the court, may well be regarded, we think, as representing, for the purposes of the suit, the remote and contingent interests of beneficiaries who cannot be joined. Certainly the representation ought to be deemed sufficient when the trustee, and all *in esse* of the class to which the unborn belong, are before the court. If Mrs. Yeaton, in the case referred to, could not, as against unborn and unbegotten children, have the alleged mistake in her antenuptial agreement corrected, then as against such parties how could she obtain a decree for the

annulment of a forged deed, or one procured by duress or fraud? No doctrine or rule of practice can be sound or tolerable which involves such possibilities.

The further objection is made that both in the Burnt Records case and in that for the appointment of a trustee it was alleged in the petition or bill that the children made defendants were the only ones interested; that the allegation was not denied; and consequently the court was not called upon, as it should have been, to consider whether or not the interests of unborn children were properly represented. But the provisions of the trust deed whereby those rights were created were fully and fairy set forth in each case, and, as has been already said in another connection, it is not to be supposed that the court entered the decrees without knowing the contents of the bills upon which it was proceeding.

In respect, however, to the second decree, rendered August 19, 1873, it should be noted that while Scott and Peabody, the trustees appointed by the deed, were made defendants, it was alleged that they had resigned, and were refusing to act further as trustees. They were therefor only nominal parties, and in fact they did nothing in the case which was, or was intended to be, representative of any interest. The proper course, we think, for the court to have taken under the circumstances, was first to appoint the new trustee and cause him to be made a party, and then to proceed with the case in the regular order. As it was, there was only a nominal representative of the legal estate before the court when the decree was entered. In all the other cases the parties necessary for the representation and protection of all interests were properly before the court; and it follows that the title acquired by the appellant through the Gilsdorff decree was good against the present attack of the complainants, who were born after its rendition, as well as against the cross-complainants, who were defendants in the case, and in whose name the appeal to the Supreme court was prosecuted.

There is a broader and more equitable view of the case which leads to the same conclusion.

The value of the trust property as it was left by the fire, accord-

ing to the estimate put upon it by Frank C. Taylor in his application for the first loan, was $25,000, and there is no evidence that it was worth more. The sublots, afterwards platted, were therefore of the average value of $5,000, and the houses built upon them each cost a little more than twice that sum, making the value of each house and lot about $15,000. That was the consideration for which one of the properties was conveyed to Julia S. Taylor; and according to the decision in *Franklin Savings Bank* v. *Taylor*, *supra*, that sale was regular, and the proceeds, it is to be presumed, went to the proper uses of the trust. As the result of the compromise agreement another lot, with improvements of equal value, was conveyed to the Taylor children, and the remaining three lots, worth without improvements not more than $15,000, were conveyed to the Savings Bank. In other words, when this suit was brought, as a result of the transactions complained of, the trust estate had been enhanced by the sum of $5,000; and the bank, in return for $20,000 of its money expended in improving two lots for the benefit of the appellees, had received three lots worth but $15,000. The aim of the suit is that those lots, with the houses on them, erected at a cost of $30,000, which the bank and its assignors, the mechanic's lien holders, contributed, shall be surrendered to the trustee for the use of the appellees, and that for its outlay of half a hundred thousand dollars, the bank shall receive nothing. The proposition involves not merely a hardship to the bank, which, according to the opinion of the Circuit court, could not be remedied without making a precedent for defeating the rights of minors; it means in our opinion, an injustice so unconscionable, in view of all the circumstances, as to make judicial sanction of it at once unnecessary and impossible.

When the trust deed was found, and the mistake made evident which had prevailed concerning the powers of the trustee, it was doubtless competent, as it would have been plainly just and right, for the parties in conformity with the authority which the trustee had, to convert their loans and mortgages into an outright sale to the bank of a part of the property equal in value to the money received and expended upon the estate. And that is practically what was accom-

plished by the compromise agreement, and by the conveyances which followed the foreclosure sale, including the deed of quitclaim which Mulliken, as trustee, and Frank C. and Mrs. Taylor joined in executing to the president of the bank; and, so long as no proffer is made of adequate recompense to the bank in some other mode, there can be, in our opinion, no good reason for disturbing the result, unless it should be to require a conveyance to the trustee of the lot which was conveyed to the Taylor children, whereby they were given a title in fee simple and a present right of possession, when they were entitled only to the remote and contingent interest defined by the trust deed. But that however, is a matter between them and their mother, in which the Savings Bank is not concerned.

If the mortgages to the bank be regarded as void, it is still true that the trustee received and used the bank's money for the purpose of improving the property, or paying for improvements already put upon it under circumstances which not only justified, but required, the expenditure. It was within the trustee's power to make improvements and to sell portions of the property for that purpose; and the fact that the money was obtained and expended without a previous bargain for the sale of any part of the property did not preclude the making of a subsequent contract to that effect. There is nothing in the terms of the trust which forbade it, and, if there were, in view of the mistake, sanctioned by two decrees of court, under which the money was obtained, equity, if it would not have compelled a settlement of the character suggested, certainly should not intervene to annul one which was fairly made by the parties, on terms to which they might in the first instance have rightfully agreed.

On the theory of our conclusion that the mortgages were valid and enforceable, the Savings Bank was never under any necessity, and therefore, possibly, had no right to seek relief on the ground of mistake; but, on the assumption that for any of the technical objections made to them the mortgages were invalid, we deem it clear that the money obtained of the bank was furnished under such a mistake of fact as to warrant equitable relief, which could

have been properly granted, in the way already indicated, by compelling the trustee and Frank C. and Mrs. Taylor to convey to the bank enough of the trust property to liquidate its demands. Between the principal parties, the bank and the trustee, it was plainly a case of mutual mistake; and if there was no mistake on the part of Frank C. Taylor, then his conduct was a fraud upon the bank, which was no less available as a ground of relief. It was upon his testimony, corroborated by other witnesses, that the two decrees of the Superior court were procured which declared the authority of the trustee to execute mortgages; and if it be conceded that those decrees were founded upon an error of fact, for which they were subject to be set aside, even as against the appellants or any third party claiming to have acquired rights under them, the very concession demonstrates the mistake, which, within the recognized rules of equity, makes the granting of relief in the manner stated both possible and proper.

The decree of the Circuit court should, therefore, be reversed, and the cause remanded, with instructions to dismiss the bill and cross-bill; and it is *So ordered.*